No. 84831-9

SUPREME COURT
OF THE STATE OF WASHINGTON

J.Z. KNIGHT,

Respondent/Petitioner,

v.

CITY OF YELM and TTPH 3-8, LLC,

Appellants/Respondents.

SUPPLEMENTAL BRIEF OF TTPH 3-8, LLC ("TAHOMA TERRA")

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I. Introduction

Respondent TTPH 3-8, LLC ("Tahoma Terra") requests that this Court affirm Division II's unpublished decision that Knight lacked standing under the Yelm Municipal Code and the LUPA, and that Tahoma Terra is entitled to a fee award under RCW 4.84.370(1).

Knight's argument for reversal based on standing fails for two reasons. First, the issue of her standing under the Yelm Municipal Code is not properly before this Court because Knight failed to assign error to the City Council's decision that she lacked standing under the Yelm Municipal Code. This failure to strictly or even substantially comply with the LUPA requirement of assignments of error renders the issue unreviewable, barring any success on appeal. Second, the record demonstrates that Knight failed to meet her burden to establish standing. She failed to show (1) prejudice to her alleged senior water rights as a result of the conditional approval of Tahoma Terra's *preliminary* plat application and (2) that a judgment in her favor on the preliminary plat application would alleviate any prejudice.

Knight also urges grounds to reverse the Court of Appeals' fee award that she never properly raised to the Court of Appeals, and therefore waived. Even if these grounds are considered, they do not prevent a fee award to Tahoma Terra under RCW 4.84.370(1). Tahoma Terra secured conditional approval of its preliminary plat application throughout this litigation. It received conditional approval from the Hearing Examiner. The City Council affirmed. The superior court left the permit approval

intact while reversing and remanding for one uncontested clarification of the Hearing Examiner's language in one portion of the decision. The Court of Appeals affirmed. Tahoma Terra was the substantially prevailing applicant entitled to an award of fees and costs under RCW 4.84.370(1).

Before the superior court, Knight overreached by insisting on entry of conclusions of law that amounted to advisory opinions for future permitting decisions. This forced Tahoma Terra to appeal to the Court of Appeals. Knight continued to oppose Tahoma Terra before the Court of Appeals, defending against the appeal with a 58-page brief that included four assignments of error and nine issue statements, *Am. Resp.'s Brief* at 3–6, and presenting oral argument. She admitted to the Court of Appeals that the findings and conclusions she had insisted the trial court enter over Tahoma Terra's objections were advisory opinions, but noted that Tahoma Terra had to appeal those advisory opinions or they would have been binding. *Am. Resp.'s Brief, IV.F.*

When Tahoma Terra again prevailed before the Court of Appeals, Tahoma Terra was entitled to its attorney fees as the successful applicant under RCW 4.84.370(1). On its face this fee statute does not make a fee award conditional on which party appealed or whether the permit decision was strictly upheld on the merits.[1]

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[1] Prior precedent including *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005), *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 223 P.3d 1172 (2009), and *Gig Harbor Marina, Inc. v. City of Gig Harbor*, 94 Wn. App. 789, 973 P.2d 1081 (1999), supports the fee award. Knight sought review after the Court of Appeals determined fees

II. Counter-Statement of Issues

A. Standing

Did the Court of Appeals properly affirm on the basis of standing because (1) Knight failed to assign error to the City's decision that Knight lacked standing under the Yelm Municipal Code in her LUPA petition, preventing review of that determinative conclusion, and (2) Knight failed to meet her burden to demonstrate that she will be prejudiced by Tahoma Terra's preliminary subdivision approval and that a judgment in her favor would substantially eliminate or redress the alleged prejudice? Yes.

B. Attorney fees

Did the Court of Appeals properly award attorney fees to Tahoma Terra under RCW 4.84.370(1) because (1) Tacoma Terra was the substantially prevailing party at all phases of review including before the superior court which sustained the permit intact, and (2) the statute's express terms impose no additional requirement, including no requirement that a party prevail "on the merits" and no requirement that a party entitled to fees be a respondent? Yes.

III. Counter-Statement of the Case

Tahoma Terra incorporates its Counter-Statement from its opposition to discretionary review. It corrects its citation to the Hearing Examiner's decision, which is found at CP 1260–1286. Knight's attachment of the reconsidered decision to her petition is missing page 2.

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and costs were proper but before the Court set the amount. Thus, the amount of fees and costs has not yet been determined.

See CP 1282–84. Attached in the Appendix are (1) the Hearing Examiner's decision (CP 1260–1286), (2) the City Council's decision (CP 25–28), (3) Knight's LUPA petition (CP 9–24), (4) the Superior Court's decision (CP 1666–1675), and (5) the fee statute at issue, RCW 4.84.370.

IV. Argument and Authority

Tahoma Terra substantially prevailed at each level where it won conditional approval of its preliminary plat application for a development planned within the jurisdiction of the City of Yelm. Tahoma Terra nonetheless appealed the superior court's decision due to findings and conclusions in the trial court order that Knight insisted be included over Tahoma Terra's objections, stated the law incorrectly, and constituted an impermissible advisory opinion on future permitting decisions (the latter of which Knight subsequently acknowledged to the Court of Appeals. *See Am. Resp.'s Brief* at 43 n.15, 55). The fact that Tahoma Terra appealed some elements of the superior court's decision does not establish that it did not prevail at that level. Tahoma Terra was entitled to the fees awarded by the Court of Appeals pursuant to RCW 4.84.370(1) as the substantially prevailing applicant.

This is a LUPA appeal. In a LUPA appeal, an appellate court "stand[s] in the shoes of the superior court and review[s] the hearing examiner's action de novo on the basis of the administrative record." *Wells v. Whatcom County Water Dist. No. 10*, 105 Wn. App. 143, 150, 19 P.3d 453 (2001). "The proper focus of our inquiry is therefore the [decision by the local jurisdiction], rather than the trial court's decision."

Id. Standing and statutory construction are legal issues reviewed *de novo*. *Habitat Watch*, 155 Wn.2d at 405–06; *Guillen v. Contreras*, 169 Wn.2d 769, 774, 238 P.3d 1168 (2010). A fee award is reviewed for abuse of discretion. *Guillen*, at 774. This Court should construe RCW 4.84.370 to give effect to the Legislature's intent that proponents of unmeritorious permit challenges absorb the costs.

A. This Court should not reverse on the issue of standing.

Knight complains that the Court of Appeals determined on the merits that she had no standing. But the Court of Appeals should not have reached the factual determination of the standing issue. And this Court should not. Knight failed to appeal the City's determination that she lacked standing under the Yelm Municipal Code ("YMC") by failing to assign error to that determination. *See* CP 26 at ¶ 3 (City's lack of standing determination); CP 13–16 (Knight's assignments of error in LUPA petition). This fatal flaw in her LUPA petition compels affirmance. This is true whether this Court decides that RCW 36.70C.070(7) requires strict or substantial compliance. Knight achieved neither.

If the Court reviews the merits of the standing issue under the YMC and LUPA, it should affirm the conclusion that Knight lacked standing. She failed to demonstrate that the Examiner's preliminary conditional approval of the Tahoma Terra Subdivision has or likely will prejudice her. She also failed to demonstrate that a judgment in her favor would redress the injuries she claims.

1. Knight's standing is not properly before this Court because her LUPA petition was deficient; this Court should affirm based on the City's determination that Knight lacked standing under the Yelm Municipal Code, a determinative decision to which Knight did not assign error.

This Court should affirm because the City Council determined that Knight lacked standing under the Yelm Municipal Code and Knight failed to assign error to that determination in her LUPA petition as required by the LUPA. This deficiency is fatal to Knight's LUPA appeal.

LUPA specifically requires that each land use petition must set forth, inter alia, the following:

- A separate and concise statement of each error alleged to have been committed; and
- A concise statement of facts upon which the petitioner relies to sustain the statement of error.

RCW 36.70C.070(7) and (8). Because Knight failed to assign error to the City Council's conclusion that she lacked standing, that issue cannot be reviewed. Because that issue is dispositive, Knight's appeal necessarily fails.

Tahoma Terra moved the trial court to dismiss Knight's petition for failing to assign error to the City Council's standing determination. CP 215–220; CP 221–236; *see also* CP 41–56. Tahoma Terra also moved the Court of Appeals for dismissal on this same ground. *Opening Brief of Tahoma Terra* at 20–22; *Reply Brief of Tahoma Terra* at 4–8. Knight's LUPA failure to assign error to the City Council's dispositive conclusion that Knight lacked standing under the YMC left the City Council's conclusion in place, foreclosing further proceedings.

This result is supported by *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 597, 972 P.2d 470 (1999). Division II held that the requirement to assign error to a dispositive conclusion is jurisdictional. In *Overhulse*, this Court recognized that all parts of the LUPA should be enforced as written, rejecting substantial compliance because it would render portions of the LUPA meaningless *Overhulse*, 94 Wn. App. at 599, citing *Cox v. Helenius*, 103 Wn.2d 383, 387–88, 693 P.2d 683 (1985) (court required to give effect to "every word, clause and sentence of a statute.... No part should be deemed inoperative or superfluous unless the result of obvious mistake or error."). This Court should hold that the requirement of .070(7) is jurisdictional, at least with regard to review of any portion of the decision to which error is not assigned. This Court only has jurisdiction to consider issues to which error was assigned in the LUPA petition.[2]

Principles of appellate law also support affirmance where error was not assigned to a determinative conclusion. A fundamental appellate precept is that the aggrieved party must assign error to those parts of the decision for which it seeks review, or lose the right to review. RAP 10.3(a) (requiring assignments of error).[3] Knight's failure to assign error

[2] When reviewing an administrative decision, the superior court acts in its limited appellate capacity. *Union Bay Preservation Coalition v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 617, 902 P.2d 1247 (1995). All statutory procedural requirements must be met before this appellate jurisdiction is properly invoked. *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998).

[3] *Nishikawa v. U.S. Eagle High, L.L.C.*, 138 Wn. App. 841, 853, 158 P.3d 1265 (2007) ("issue is not properly before us" where appealing party

to the determinative conclusion of lack of standing under the YMC required affirmance.

Washington courts require "strict compliance with LUPA's procedure," emphasizing that a land use petition is barred, and the court may not grant review, if timely filing and service is not completed in accordance with LUPA's procedures. *Witt v. Port of Olympia*, 126 Wn. App. 752, 756, 109 P.3d 489 (2005) (quotations omitted); *see also* RCW 36.70C.040(2). The "explicit statutory language [of LUPA] forecloses the possibility that the doctrine of substantial compliance applies." *Id.* Where a statutory directive is unequivocal, substantial compliance does not apply. *Nitardy v. Snohomish County*, 105 Wn. 2d 133, 712 P.2d 296 (1986). Knight never assigned error to the lack of standing determination. CP 13–16. She failed to strictly comply.

Knight also did *not* substantially comply. Knight's LUPA petition totally and completely failed to address the City Council's conclusion regarding standing under the YMC. Knight gave no notice that in the LUPA proceedings this portion of the City Council's decision would be reviewed. This Court should reject out of hand Knight's argument that a party automatically assigns error to all legal conclusions in a decision by challenging the entire "decision." *See Am. Resp.'s Brief* at 16 ("The Petition states that it is brought to 'challenge the City of Yelm's decision.'

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failed to assign error to a particular trial court decision); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument made in reply is too late to support assignment of error, especially where existence of issue is obvious).

. . . As such it appeals the entire decision.") (emphasis in original). Such an argument renders useless .070(7)'s requirement to make specific assignments of error. *See Chelan County v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002) (courts must give effect to the plain meaning and should assume the legislators meant exactly what it said). The Legislature has clearly rejected such an argument by including .070(7) in the LUPA.

This Court also should reject Knight's argument that she addressed the City's dispositive conclusion on standing under the YMC by reciting facts allegedly supporting her LUPA standing. The latter is not a substitute for the former. Knight made no mention in her LUPA Petition of the City's standing determination or the YMC requirements for standing. The organization and content of her petition rebut her argument. Knight attempts to rely on section 6 of her Petition, titled "Facts Demonstrating that the Petitioner Has Standing to Seek Judicial Review *Under RCW 36.70C.060*." (emphasis added). *See* CP 11–13. By its title and allegations, that section relates to standing under the LUPA, not the YMC. Standing under the LUPA is a separate, required element of a LUPA petition that Knight addressed in section 6. In the next section, section 7, Knight listed "A Separate and Concise Statement of Each Error Alleged to Have Been Committed." CP 13–16. There is no assignment of error to the City's standing determination in this section. Knight listed ten separate assignments of error, but never mentioned the City's standing decision. In section 8, Knight alleges facts supporting her statements of error, and nowhere addresses facts related to standing. CP 16–23.

No reasonable person would discern a challenge to the City's decision on standing under the YMC from Knight's petition.[4] Knight failed to strictly or substantially comply with the LUPA by failing to assign error to the City's standing decision.

The cases *Keep Watson Cutoff Rural v. Kittitas County*, 145 Wn. App. 31, 184 P.3d 1278 (2008), *Quality Rock Prods., Inc. v. Thurston County*, 126 Wn. App. 250, 108 P.3d 805 (2005), and *Conom v. Snohomish County*, 155 Wn.2d 154, 161–62, 118 P.3d 344 (2005), do not address failure under RCW 36.70C.070(7) to assign error.[5]

Tahoma Terra does not request that this Court find lack of jurisdiction over Knight's entire LUPA petition by virtue of the failure to assign error to the standing conclusion. The point is that the issue of standing under the YMC cannot be reviewed; therefore, success on the appeal is foreclosed.

The LUPA's purpose is to create "consistent, predictable, and timely review." *Keep Watson*, 145 Wn. App. at 39. To create consistent,

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[4] By contrast, Knight included the previously missing assignment of error in her Assignments of Error to the City Decision in her brief to the Court of Appeals. *See Am. Resp.'s Brief* at 4, Assignment of Error #2.

[5] *Keep Watson* addressed RCW 36.70C.070(4), and held that the requirement that an appealing party attach a copy of the decision to their petition is not jurisdictional to the petitioner's LUPA appeal. *Id.* at 39 ("[Petitioner's] failure to attach copies of the land use decisions to its petition does not divest the superior court of jurisdiction to hear the petition."). *Quality Rock* and *Conom* determined that service pursuant to CR 10 and the noting of a hearing pursuant to RCW 36.70C.080(1), respectively, were not jurisdictional requirements of LUPA and required substantial compliance. These cases then found substantial compliance.

predictable and timely review, this Court should hold that failure to assign error to a conclusion of the local jurisdiction prevents that issue from being judicially examined. Where that issue is determinative, the LUPA appeal necessarily fails. The Court should affirm.

2. The Court of Appeals correctly affirmed the City Council's ruling that Knight lacked standing under the YMC and correctly determined that Knight lacked standing under the LUPA.

If the Court examines the merits of Knight's standing to challenge approval of Tahoma Terra's preliminary plat application, it should affirm the Court of Appeals because Knight lacks standing under the YMC and the LUPA.

In her briefing to this Court, Knight argued that the facts on standing be viewed in a light favorable to her. *See Motion for Discretinary Review* at 9–10. This is wrong. The superior court denied Tahoma Terra's motion to dismiss, CP 443–446, and denied Tahoma Terra's motion for summary judgment on standing. CP 659–660. The parties then submitted merits briefing. *See* CP 829–859 (Tahoma Terra); CP 1198–1238 (City); CP 661–698 (Knight). The superior court held oral argument on the merits. CP 1561. The superior court's disposition of the LUPA appeal (CP 1636–1645) was based on merits briefing. Knight is entitled to no favorable view of her evidence. Knight must be held to her evidentiary burden to establish standing. She failed to meet it.

Knight lacked standing to appeal the Examiner's Decision to the Yelm City Council, and she lacked standing under LUPA. Under the

YMC, an appeal of a Hearing Examiner's final decision to the Yelm City Council can only be filed by an "aggrieved person or agency of record." YMC 2.26.150. Knight failed to comply with the YMC because she did not offer evidence *to the Examiner* of her alleged standing. Knight needed to establish an evidentiary record of standing before the Examiner. She conceded to the superior court that she did not do so. CP 248. She only asserted facts relevant to the standing inquiry in her reply brief to the City Council. CP 111–116. This was too late because pursuant to YMC 2.26.150.F, Knight's appeal to the City Council was a closed record appeal, i.e., it was based solely on the record created by the Examiner. The only other evidence Knight presented regarding standing she presented to the superior court in declarations in response to the motion for summary judgment. CP 585–642. These declarations did not demonstrate that the Examiner's preliminary conditional approval of the Tahoma Terra Subdivision prejudiced or likely will prejudice her. *Id.*

Knight's asserted interest amounted only to that of the general public. A LUPA petition must allege facts demonstrating that the petitioner has standing to seek judicial review under RCW 36.70C.060. RCW 36.70C.070(6). Similar to the "aggrieved" standard in the YMC, under LUPA Knight needed to demonstrate that she is a "person aggrieved or adversely affected by the land use decision." She failed to meet her burden to show two necessary elements: (1) the Tahoma Terra Subdivision preliminary plat approval has or likely will prejudice her; and (2) a judgment in her favor would substantially eliminate or redress the alleged

prejudice. *See* RCW 36.70C.060(2)(a) and (c). Conjectural or hypothetical injuries do not support standing. *Trepanier v. Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992). Knight needed to demonstrate that she will be "specifically and perceptibly" harmed by the appealed action. *Id.* at 382. "An interest sufficient to support standing to sue ... must be more than simply an abstract interest of the general public in having others comply with the law." *Chelan County v. Nykreim*, 146 Wn.2d 904, 935, 52 P.3d 1 (2002) (citations omitted). A bald assertion that a plaintiff has standing is insufficient. *Concerned Olympia Residents for the Env't v. Olympia*, 33 Wn. App. 677, 683, 657 P.2d 790 (1983). *See also Snohomish County Prop. Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 53, 882 P.2d 807 (1994) ("The pleadings and proof are insufficient if they merely reveal imagined circumstances [which could affect plaintiff].")

It is significant that the permitting decision at issue was a *preliminary* plat application. Knight could not show injury-in-fact because the Examiner's Decision was a preliminary conditional approval. The alleged injury-in-fact to Knight's asserted interests are exactly the type of conjectural and hypothetical injuries that are insufficient to support standing. For the Tahoma Terra Subdivision to generate water demand, it must first obtain final plat approval and building permits. Both the Examiner's condition and state law require a showing of an adequate supply of potable water at the time of final plat approval and a building permit issuance. *See* RCW 58.17.150(1) (final plat approval) and RCW 19.27.097 (building permit). If such a showing is not made, the City

cannot grant final plat approval or building permits, and Knight's injury will never occur. As a matter of law, no harm can result to Knight's water rights as a result of the preliminary conditional approval of the Tahoma Terra Subdivision.

Knight also failed to demonstrate that a judgment in her favor would redress the injuries she claims. RCW 36.70C.060(2)(c). Her claimed injury to her more senior water rights could not have been redressed in her LUPA appeal. In ruling on applications for preliminary subdivision approval, the City has no authority to determine the status or content of the City's water rights; nor does the superior court or the Court of Appeals in an action brought under LUPA. A final determination of water rights may be made only in a formal water rights adjudication under Washington's Water Code. *Rettkowski v. State*, 122 Wn.2d 219, 858 P.2d 232 (1993). That is not the nature of this LUPA action. A judgment in Knight's favor, therefore, would not substantially eliminate or redress her alleged injury as required for standing under RCW 36.70C.060(2)(c).

Moreover, the Hearing Examiner's decision, when considered in full, must be considered to require a showing of adequate potable water "at final plat approval **and** building approval," as the Examiner stated multiple times (CP 1283 at #2 (decision on reconsideration)(emphasis added); CP 1270–71 at #16 (expressing the same legal requirements in the original decision)), and as the law requires. The undisputed clarification by the superior court was unnecessary and achieved nothing not required by the original permit and the law. The fact that "and/or" appeared in one

portion of the decision does not create standing for Knight. Nor is her standing defeated by "later" events before the superior court. This Court should affirm the Court of Appeals' lack of standing determination.

B. This Court should affirm the award of attorney fees and costs to applicant Tahoma Terra under RCW 4.84.370(1) because Tahoma Terra substantially prevailed at each stage of the permit dispute.

The Court of Appeals did not abuse its discretion when it awarded Tahoma Terra attorney fees pursuant to RCW 4.84.370(1). It did not misunderstand the statute. Tahoma Terra successfully defended its permit rights at each stage of this litigation. The face of .370(1) permits the fee award to Tahoma Terra. The Legislature created no additional hurdles. Knight should bear the financial burden of her nonmeritorious challenges. Tahoma Terra's *Opposition to Knight's Motion for Reconsideration* rebuts in more detail Knight's present arguments against a fee award.[6]

Tahoma Terra substantially prevailed, because it obtained and maintained its conditional preliminary plat approval at each level. "The determination as to who substantially prevails turns on the substance of the relief which is accorded the parties." *Marine Enterprises, Inc. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 772, 750 P.2d 1290 (1988). A party can be the prevailing party notwithstanding losses on some issues or

[6] Included in that briefing is the explanation that Knight waived many of her current arguments by failing to include them in her respondent's brief. Because these arguments were waived, including whether a fee award is proper where a party prevails on procedural grounds instead of the merits, this Court need not reach them to affirm.

offsets based on other causes of action. *See Dawson v. Shearer*, 53 Wn.2d 766, 767–68, 337 P.2d 46 (1959).

Before the Court of Appeals, Knight opposed a fee award on only one ground: that under RCW 4.84.370(1) Tahoma Terra cannot be considered the prevailing party at the superior court because that court "reversed" the permit to clarify the "and/or" condition. Knight argued that RCW 4.84.370(2) required the superior court to strictly affirm the permit in order for any party to win attorney fees. *Am. Resp.'s Brief* at 54–57. This argument misreads RCW 4.84.370. Although Knight acknowledged that RCW 4.84.370(2) did not apply to the applicant Tahoma Terra, she argued that "the logic of [RCW 4.84.370(2)] applies equally to Tahoma Terra" as the City. *See id.* at 54–57. Knight failed to perceive that .370(2) is not a limit on .370(1), but an additional ground upon which a city could recover fees in LUPA litigation. Knight reads .370(2) as a restriction on cities (and, incredibly, applicants claiming fees under .370(1)) when it is in fact an expanded ground for a city to recover fees.

Knight's LUPA petition raised multiple challenges to the preliminary plat approval. CP 13–16. At the conclusion of the superior court proceedings, the only relief entered was a re-wording of the condition imposed by the Hearing Examiner to affirm a meaning with which all parties agreed. The meaning of the condition was not disputed. The trial court's reversal was in name only; Knight obtained no relief

against Tahoma Terra that differed from the City's decision.[7] But Knight obtained improper findings and conclusions regarding a future final plat application that was not before the superior court,[8] so Tahoma Terra appealed. When Tahoma Terra again prevailed before the Court of Appeals, an award of fees and costs under RCW 4.84.370(1) was proper.

Knight also argues that RCW 4.84.370 only permits a fee award against an appellant. The statute contains no such limitation. The statute does not insulate a party like Knight from liability for attorney fees where she seeks improper relief in the superior court, triggers an appeal by the applicant or local authority, and opposes the appeal. To avoid liability under RCW 4.84.370, Knight should have abandoned defense of the appeal. Instead, she participated with an overlength brief containing four assignments of error and nine issue statements, *Am. Resp.'s Brief* at 3–6, and oral argument, continuing to push her view of what constitutes a

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[7] Additionally, the issues tangential to issuance of the permit concerning future notice provisions imposed by the superior court on the City do not involve Tahoma Terra and should not affect the analysis of whether Tahoma Terra prevailed in superior court.

[8] Knight admitted on appeal that the conclusions were advisory and had no meaning. *See Am. Resp.'s Brief* at 43 n.15 (noting that use of the word, "if" in Conclusion #5 renders it advisory, and the conclusion was included "in order to assist the parties"). Knight also stated that Tahoma Terra had to appeal or the findings and conclusions were binding. *Id.* at 55 ("absent an appeal" a superior court's findings and conclusions cannot be ignored). Indeed, Tahoma Terra appealed because the law of the case doctrine appeared to compel the appeal. *Golberg v. Sanglier*, 27 Wn. App. 179, 190, 616 P.2d 1239 (1980) (appellate courts follow the "law of the case" doctrine whereby trial court conclusions which were not challenged on appeal become the established law of the case), *rev'd on other grounds*, 96 Wn.2d 874, 639 P.2d 1347 (1982). Tahoma Terra had objected to the findings and conclusions. CP 1603–1605; 1584–1588.

reasonable expectancy that adequate water will be available sufficient to secure final plat approval. *Id.* at 44–52.

No case has held that a party must be a respondent to benefit from the fee statute at issue. In *Gig Harbor Marina, Inc. v. Gig Harbor*, 94 Wn. App. 789, 973 P.2d 1081 (1999), and *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005), the challenges were brought by parties who did appeal and against whom fees were awarded. Those courts referred to "an appellant" within that context. The language in these cases regarding imposing fees on an appellant is not determinative of this issue, which was not before those courts.[9] An applicant who appeals from the City's decision can still be the prevailing party at the City level if the City's decision was more favorable to the applicant than the hearing examiner's decision had been. *See Gig Harbor Marina*, 94 Wn. App. at 797–99; *see also Habitat Watch*, 155 Wn.2d at 415–16. The *Gig Harbor Marina* court noted that the statute was "neutral on its face" as to who could qualify for fees. *Gig Harbor Marina*, 94 Wn. App. at 797.

The prior division split regarding whether a party must prevail on the merits to qualify for a fee award is resolved in light of *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 223 P.3d 1172 (Div. II 2009). Previously, Division I and II differed over this issue.[10] The Supreme

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[9] *See State v. Potter*, 68 Wn. App. 134, 150 n.7, 842 P.2d 481 (1992) (providing that statements unrelated to an issue before the court (*obiter dictum*) need not be followed).

[10] *See Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 972 P.2d 470 (Div. II 1999) (must reach merits), and *Witt v. Port of Olympia*, 126 Wn. App. 752, 758–60, 109 P.3d 489 (Div. II 2005) (same);

Court's decision in the subsequent case *Habitat Watch v. Skagit County,* construed RCW 4.84.370 to permit an award of fees to an applicant or a local authority for a procedural victory, although the Court did not expressly decide the issue. *See Habitat Watch*, 155 Wn.2d at 404–13. After *Habitat Watch*, the issue again was presented to Division II in *Nickum*. The *Nickum* court held that the parties who succeeded with their procedural defenses were prevailing parties, stating, "'Prevailing party' under the statute includes circumstances in which courts dismiss a LUPA action on jurisdictional grounds." *Nickum, supra* (citing *San Juan Fidalgo Holding Co. v. Skagit County*, 87 Wn. App. 703, 943 P.2d 341 (1997)). The split and the *Habitat Watch* holding were specifically briefed to the *Nickum* court. *See Nickum v. City*, 2008 WA App. Ct. Briefs 967745, 2009 WA App. Ct. Briefs LEXIS 65 (Wash. Ct. App. Jan. 23, 2009). Aware of the prior caselaw and the more recent development in the law, the *Nickum* court awarded fees to a procedural victor. Thus, Division II's most recent decision (in addition to this case) adopts the Division I approach.

This is the better approach. The Legislature expressed no intent that a right to fees be conditioned on a win on the merits instead of other grounds such as lack of standing. This Court should expressly hold that a party need not prevail "on the merits" to qualify for a fee award under RCW 4.84.370.

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cf. Prekeges v. King County, 98 Wn. App. 275, 285, 990 P.2d 405 (Div. I 1999) (can prevail on any ground).

C. This Court should award Tahoma Terra attorney fees and expenses for these proceedings.

A large portion of this brief addresses the right of an applicant to fees under RCW 4.84.370(1). As the statute and *Habitat Watch* make clear, the statute applies to Supreme Court proceedings. For the same reasons set forth above, and pursuant to RAP 18.1(j), this Court should award Tahoma Terra its attorney fees and expenses incurred upon Knight's petition for review.

V. Conclusion

This Court should affirm. Knight's failure to assign error to the City Council's dispositive standing decision renders her LUPA appeal unsuccessful. Moreover, Knight had no standing under the YMC or the LUPA. She failed to meet her burden to show any prejudice, or that a judgment in her favor on review of the preliminary plat application would substantially eliminate or redress any alleged prejudice. Even though she owns senior water rights in the area, preliminary approval of Tahoma Terra's plat does not injure or prejudice these rights. She has no greater interest than any member of the public in the preliminary approval.

The Court of Appeals did not abuse its discretion when it awarded fees and costs. Knight commenced this litigation disputing the preliminary plat approval; and she never stopped her opposition to that approval. Nothing about the fee statute prevents an award to Tahoma Terra in these circumstances. Tahoma Terra successfully defended the conditional approval of its preliminary plat application at each stage.

Dated this 2nd day of December, 2010.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: _____

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("Tahoma Terra")

CERTIFICATE OF SERVICE

On this 2nd day of December, 2010, I caused to be delivered in the manner indicated below a true and correct copy of the foregoing SUPPLEMENTAL BRIEF OF TTPH 3-8, LLC ("TAHOMA TERRA"), to the following:

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Mary A. Williams

TABLE OF CONTENTS TO APPENDIX

APPENDIX - 1

OFFICE OF THE HEARING EXAMINER

CITY OF YELM

REPORT AND DECISION

CASE NO.: SUB-07-0187-YL (TAHOMA TERRA PHASE II, DIVISIONS 5 AND 6)

APPLICANT: TTPH 3-8 LLC
4200 6th Avenue SE #301
Lacey, WA 98503

AGENT: KPFF Consulting Engineers
4200 6th Avenue SE #309
Lacey, WA 98503

SUMMARY OF REQUEST:

The applicant is requesting approval to allow subdivision of approximately 32 acres into 198 single family residential lots.

SUMMARY OF DECISION:

Request granted, subject to conditions.

PUBLIC HEARING:

After reviewing Planning and Community Development Staff Report and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

The hearing was opened on July 23, 2007.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

EXHIBIT "1" - Planning and Community Development Staff Report and Attachments
EXHIBIT "2" - Letter to Grant Beck from Jeff Schramm dated July 19, 2007
EXHIBIT "3" - Letter to Grant Beck from Clinton Pierpoint and Mark Steepy dated July 20, 2007
EXHIBIT "4" - Letter to Tahoma Terra LLC, Attn: Doug Bloom from William

Halbert dated July 19, 2007

EXHIBIT "5" - Letter to City of Yelm from Thomas Loranger dated December 22, 2006

EXHIBIT "6" - Letter to Examiner from Keith Moxon dated July 23, 2007, with attachments

EXHIBIT "7" - Letter to Grant Beck from Clinton Pierpoint dated July 31, 2007

EXHIBIT "8" - Letter to Examiner from Jeff Schramm dated August 1, 2007

EXHIBIT "9" - Letter to Examiner from Curtis Smelser dated August 2, 2007

EXHIBIT "10" - Letter to Examiner from Kathleen Callison dated August 3, 2007

EXHIBIT "11" - Letter to Examiner from Keith Moxon dated August 10, 2007

EXHIBIT "12" - Letter to Examiner from Kathleen Callison dated August 16, 2007

EXHIBIT "13" - Letter to Grant Beck from Mark Steepy dated August 16, 2007

EXHIBIT "14" - Letter to Examiner from Curtis Smelser dated August 17, 2007

EXHIBIT "15" - Letter to Examiner from Keith Moxon dated August 21, 2007

EXHIBIT "16" - Letter to Examiner from Edward Wiltsie dated August 22, 2007

EXHIBIT "17" - Letter to Examiner from Curtis Smelser dated August 24, 2007

EXHIBIT "18" - Letter to Examiner from Kathleen Callison dated August 24, 2007

EXHIBIT "19" - Letter to Examiner from Edward Wiltsie dated September 4, 2007

EXHIBIT "20" - Memorandum Decision from Examiner dated September 13, 2007

GRANT BECK appeared, presented the Community Development Department Staff Report, and testified that the applicant previously received conceptual master site plan approval for Tahoma Terra on a 220 acre parcel. The applicant also received final master site plan approval for Phase 2 and final plan approval for Phase 1 east of Thompson Creek as well as final plats for projects in Phase 1. The applicant has received approval to develop 200 lots in Divisions 3 and 4 and today requests approval for development of the most westward part of the project into 198 lots. The conceptual approval required compliance with the comprehensive plan for the area, and final approval required compliance with the zoning code for the area. The subdivisions are then tested against the conceptual and final site plan approvals. Staff finds that the project meets all of the criteria plus the mitigating measures issued in the MDNS for the entire project. The transportation mitigating measures require improvements keyed to trip generations from the entire site. Trip generations trigger Longmire Street improvements, and Tahoma Boulevard is under construction. The bridge across Thompson Creek is also under construction, and a City LID will provide funding to construct the remaining portion. Improvements not yet triggered include the reconstruction Mosman Road. The MDNS also addressed water availability and allowed 89 lots within the master site plan and required transfer of water rights to the City. The applicant conveyed the dairy farm water rights, and will convey the golf course water rights to the City. The dairy has been conveyed. The golf course has not been transferred as yet, but will be shortly. These transfers fulfill the SEPA condition. The City will not issue building permits until it receives the transfers from both the farm and the golf course. The threshold determination is adequate as the environmental official can use the previous threshold determination unaltered if it addresses the proposal. The applicant is submitting exactly what it submitted with the conceptual approval. Therefore, the City can use the

MDNS unaltered. The site meets all parks and multi-family requirements. The MPC uses different standards and Phase 2 utilized the adopted 1992 DOE Manual for stormwater. The applicant analyzed the stormwater requirements as opposed to designing the system. They have proposed a system to the south of the boulevard, but that may not be the final location as the plan presently shows lots. The concurrency for water availability is discussed in the staff report. The staff report would be no different if the City were not the purveyor, and he did not get into depth in his analysis of water availability. The amount of water available in the City as a whole was not raised until this morning.

CURT SMELSER, attorney at law, appeared, introduced the applicant's case, and requested that the record remain open for them to respond to Mr. Moxon's submittals.

DOUG BLOOM, applicant, appeared and testified that he has worked closely with staff throughout the process and agrees with the entire staff report.

JEFF SCHRAMM appeared and testified that he has worked as a traffic engineer for 14 years and in 2005 prepared the TIA for the entire project. He identified the traffic impacts and the proposed mitigation. He disagrees with Mr. Moxon's letter which was introduced as Exhibit "2". He evaluated the traffic for the entire MPC. He did evaluate the impacts of the entire build-out and also identified impacts to the street system. He evaluated the road threshold capacity. When the capacity street standards were exceeded, he recommended mitigation.

CLINT PIERPOINT, project engineer, appeared and referred to the MPC process. The stormwater facilities were approved as part of the Tahoma Boulevard extension and were identified in phases 3 and 4. The stormwater system will accommodate all stormwater in Divisions 3 and 4 and from the boulevard. They designed the system to meet the 1992 DOE Manual.

MARK STEEPY, professional engineer, appeared and introduced Exhibit "3", his response letter to Mr. Wiltsie's letters. The stormwater ponds were considered in the previous approval pursuant to the boulevard plans. They did base the infiltration of the water on one test pit and now have a usable pond with infiltration of six to seven inches per hour which gives them a significant factor of safety. They will discharge no stormwater to the Thurston Highlands project.

BILL HALBERT, geologist and hydrogeologist, appeared and introduced his response to Mr. Wiltsie's letters. They originally performed one test, but have since graded and constructed the pond. The pond is 7.5 feet deep and ten feet of top soil was removed. The results of their test indicate infiltration rates on an average of 6-7 inches per hour which is consistent with the geology of the site. Soils in the pond area vary from silts to the west to gravel. The area is in the terminal area of the last glaciation period and has many interesting soil types. The gray color indicates high groundwater conditions and is referred to as glayed. They found gray sand mixed with rocks and a wide range of sand color. They installed three wells 28 to 30 feet below the surface and found the water 18 to 20 feet

below. In late May and June of this year the water was 20 feet below. It will not rise more than five feet. Thompson Creek acts as a drain and controls the elevation of the groundwater. They graded the topsoil off and now have geologic material only in the pond. Changing the land use to residential will result in groundwater containment. The project will better treat water than the dairy farm as it is common practice to spray waste over the pasture to fertilize the grass. The homeowners will not use fertilizers or pesticides at greater quantity. He knows of no issues related to residential use. They evaluated the well logs within .5 miles north of the property and down gradient. Of the 20 wells, none were less than 50 feet deep and some were more than 100 feet deep.

MR. PIERPOINT reappeared and testified that they will treat the water in a settling pond and that the ponds are receiving water now. They were constructed in January, 2007. The water settles first and then goes to the infiltration pond. The first pond will silt up and then the water flows to the second pond. After the site is stabilized they will remove the top six inches of silt. The homeowners association will have responsibility for maintaining the pond.

KEITH MOXON, attorney at law representing J.Z. Knight, appeared and introduced Exhibits "5" and "6" concerning water rights and his letter and exhibits. He excerpted pages from the original TIA and referred to page 2 specifically. We now have 568 units. None of the other development we have considered today was considered in previous Tahoma Terra approvals. He referred to page 11, an assessment of the MPC, and referred to conceptual mitigation. He also referred to page 7 of the staff report. The City says it can adopt the MDNS, but the report itself said that the SEPA based analysis was only valid for the first two phases. He has not taken the study out of context. The stormwater dialogue has been helpful. Mr. Wiltsie did the best he could with the information he had. He referred to Mr. Wiltsie's letter as Exhibit "B" and understands that his information was not correct. He may not have had complete information, but the tests are available now. Concerning water, his understanding is that the dairy conveyed the rights to the City and that DOE approved the transfer. The City was allowed 719 acre feet per year which equals 2,100 units. However, outside of the MPC the City only has 1,500 ERUs. A significant question exists as to the number of units the City has connected to its water supply. The City Comprehensive Plan requires 300 gallons per day per ERU. Even though the City doesn't use that figure, the comprehensive plan says it must. Two water rights are reportedly transferred, the golf course and McMonigle. Exhibit "F" and Tab "C" to Exhibit "6" refer to approval by DOE. Exhibit "G" authorizes termination of the agreement. The City could say in writing that it will supply water, but we need to know how it calculates water availability. The water is not presently in place. The subdivision code is clear that the City must ensure water availability at the time of subdivision approval. Adequate and available water is required now to obtain concurrence. The City can't approve the subdivision now and hope the water comes later, as doing so places the public in a precarious position. They are not attempting to block development, but want to ensure compliance with development regulations and obtain answers to their questions. It is unknown if DOE will approve the water rights and when the rights will be transferred. Mr. McDonald has addressed these issues in his memorandum. The threshold question is whether the City has looked at the water rights in consideration of

the ERUs which require 300 gallons per day for concurrence. The Hearing Examiner must follow the code and determine water availability.

MR. SCHRAMM reappeared and testified that he did identify mitigation for traffic impacts for the entire project. He built the formulation for the additional phases. He agrees that a master plan is conceptual, but he identified specific trigger points for road improvements and the City agreed. He referred to pages 4 and 5 of the staff report. The TIAs performed by other projects considered this project.

MR. PIERPOINT reappeared and testified that concerning stormwater design, the test pits measure 17.5 feet below the existing ground and the finished grade is 7.5 feet below the original grade. The ponds were reviewed and approved as part of the boulevard plan and Phases 3 and 4. They are not in the design process, but have already been constructed.

MR. HALBERT reappeared and testified that the bottom of the pond is 15 feet above Thompson Creek.

MR. SMELSER reappeared and requested that the record remain open.

MR. BECK reappeared and testified that the conceptual and final site plans were approved at the same time, that the City conditioned the eastern portion of the site, but that the western side was more of a guess. However, they guessed exactly right with the TIA. Mr. Schramm was on point when he testified that the City considered Tahoma Terra when evaluating traffic impacts of nearby development. The City did consider the cumulative impacts. The cumulative impacts allowed them to impose additional mitigation. The City does not issue a water availability letter, but they perform water calculations. They are constantly aware of their water availability and concurrency. Concurrency means now or within six years. The McMonigle rights, when transferred, will provide more than adequate water for Tahoma Terra. The dairy farm provided 155 acre feet which will serve 514 ERUs and the golf course will provide 180 acre feet which will serve 811 ERUs.

MR. MOXON reappeared and testified that it would be helpful if Mr. Beck was relying on an addendum to the TIA for other developments. He was unaware of the other TIAs. Concerning water, the dairy farm only provides 462 ERUs in accordance with the comprehensive plan standard, not 514. Up to this point the farm would cover up to the maximum usage, but only one-half of the projects are covered by water from the golf course and McMonigle. The staff report contains no discussion and the City does not keep track of the ERUs. The City cannot provide evidence of water rights unless DOE approves the transfer. Without the transfer the City has no water to cover any of the development today. Concerning SEPA compliance, the neighborhood commercial has not been completed.

MR. SMELSER reappeared and testified that the commercial permits are ready for submittal and that no permits on the west side will be issued until that occurs.

MR. BECK referred to page 6 of the staff report for his discussion of water rights. The City has received the first application for commercial development and it is in process.

No one spoke further in this matter and so the Examiner took the request under advisement and the hearing was concluded.

NOTE: A complete record of this hearing is available in the City of Yelm Community Development Department

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. The Hearing Examiner has admitted documentary evidence into the record, previously viewed the property, heard testimony, and taken this matter under advisement.

2. The City of Yelm SEPA Responsible Official issued a Mitigated Determination of Nonsignificance based on WAC 197-11-158 on May 24, 2005. No appeals were filed.

3. Notice of the date and time of the public hearing before the Hearing Examiner was posted on the project site, mailed to the owners of property within 1,000 feet of the project site, and mailed to the recipients of the Notice of Application on July 9, 2007. Notice was also published in the Nisqually Valley News in the legal notice section on July 13, 2007.

4. The Tahoma Terra Master Planned Community (MPC) consists of a generally rectangular, 220 acre parcel of property located south of SR-510 and west of SR-507 in the southwest portion of the City of Yelm. The Draght family previously used the parcel for a dairy farm for many years, but ceased operation in 1993. The applicant subsequently acquired ownership of the farm and applied for approval of a Master Plan Development pursuant to Chapter 17.62 of the Yelm Municipal Code (YMC). Subsequent to submittal of the application the following land use actions have occurred:

   A. On August 2, 2005, the Examiner issued a recommendation of approval of the Tahoma Terra Conceptual Site Plan for the Master Plan Development.

   B. The Yelm City Council approved the conceptual plan on August 10, 2005.

   C. On June 6, 2006, the Examiner issued a decision approving Phase II Tahoma Terra Final Master Site Plan which covered the area west of Thompson Creek.

D. The Examiner issued decisions approving preliminary subdivisions for Phase 1, Divisions 1 and 2 consisting of 215 single family lots. The City has issued final plat approval and builders are constructing homes within said subdivisions.

E. Site plan review approval was issued for Phase 1 multi-family, a 48 unit multi-family complex not yet under construction.

F. The Examiner issued a decision approving a preliminary plat for Divisions 3 and 4 of Phase 2, west of Thompson Creek. The City has approved civil engineering plans and construction of the subdivisions has commenced.

5. The applicant now requests preliminary plat approval for Divisions 5 and 6 of Phase II of the MPC which proposes subdivision of 32.6 acres into 198 single family residential lots. The Final Master Site Plan designates Divisions 5 and 6 as Low Density Residential (R4-6) which requires a minimum density of four dwelling units per gross acre and allows a maximum density of six dwelling units per gross acre. The R4-6 zone classification sets forth requirements for minimum setbacks, building heights, off-street parking, and lot access. Said classification also includes features to encourage "unique and distinct sub-neighborhoods within the Phase 2 master plan".

6. The site plan shows access provided by an internal plat road extending north from Tahoma Boulevard and five accesses provided to Divisions 3 and 4 to the east. Road stub-outs are also provided to the north and west property lines. The average lot size measures 5,000 square feet and the density calculates to six dwelling units per gross acre. The project complies with the R4-6 zone classification adopted for the Tahoma Terra MPC.

7. Chapter 14.12 of the Yelm Municipal Code (YMC) requires new subdivisions to provide a minimum of 5% of the gross area as usable open space. The preliminary plat map shows a park adjacent to the northeast corner of the intersection of Tahoma Boulevard and the internal plat road. Said park extends east to the Phase II community park proposed for Divisions 3 and 4. The community park will ultimately measure six acres in size. The plat map also shows pocket parks and smaller neighborhood park in the northwest corner. The overall Tahoma Terra MPC provides approximately 60 acres of open space land which includes Thompson Creek and its associated floodplain and wetland system. The applicant will enhance said area with park facilities and footpaths. The plat makes appropriate provision for open spaces, parks and recreation, and playgrounds.

8. A mitigating measure in the MDNS issued for the MPC requires the applicant to enter a school mitigation agreement with Yelm community schools to offset the impacts of school aged children residing in the subdivision. Entry of such agreement will ensure appropriate provision for schools and school grounds.

9. The internal plat roads will include a variety of streetscapes to include sidewalks on one side of the road. Sidewalks will provide access to the proposed community park as well as to Tahoma Boulevard which will have sidewalks and bike lanes. The sidewalks along Tahoma Boulevard will connect to recreational trails within the Thompson Creek open space and with the community park located in Phase I on the east side of the creek. The applicant will also coordinate bus stops with Inter-City Transit when service becomes available. The applicant will dedicate all streets to the City upon final plat approval, and the site plan shows continuation of streets to adjoining subdivisions. The subdivision provides a street grid system and continuation of streets from other development in the MPC. Furthermore, as found hereinafter, the project will comply with all traffic mitigation requirements set forth in the MDNS for the overall Tahoma Terra MPC, and therefore the preliminary plat makes appropriate provision for streets, roads, alleys, and other public ways.

10. The City of Yelm will provide both domestic water and fire flow to the site and the applicant will decommission any existing water wells pursuant to Department of Ecology (DOE) standards. The applicant will also use reclaimed water from the City's wastewater treatment plant for irrigation, decorative fountains, street cleaning, dust control, fire fighting, and other uses with the exception of public consumption. The City will also provide sanitary sewer service to each lot. The preliminary plat makes appropriate provision for potable water supplies and sanitary waste.

11. Mr. Edward A. Wiltsie, professional engineer, submitted comments and concerns regarding the storm drainage system for Divisions 5 and 6 in a letter dated May 23, 2007. The applicant responded to Mr. Wiltsie's concerns in a letter from KPFF Consulting Engineers dated July 20, 2007, (Exhibit "3"), and in a letter from Insight Geologic, Inc., dated July 19, 2007 (Exhibit "4"). Mr. Wiltsie responded to the applicant's engineers in a letter dated August 9, 2007 (Exhibit "11"), and the applicant's engineer, KPFF, responded to Mr. Wiltsie in a letter dated August 16, 2007. Despite Mr. Wiltsie's concerns it appears that the interim storm drainage system meets City standards which include the 1992 DOE Manual. Furthermore, City ordinances require that the storm drainage system meet such standards, and the final master plan also requires that all stormwater systems be consistent with the 1992 Manual. If discharge to surface water becomes necessary, such will trigger the need to meet the requirements of the NPDES system and compliance with the 2005 DOE Manual. However, infiltration is the standard within the City for disposing of treated stormwater. The preliminary stormwater report includes a conceptual design for the treatment and infiltration of stormwater entirely within the boundary of the MPC. The plan proposes to direct water first to a wet pond and then to an infiltration pond. The CCRs for the MPC will address the use of pesticides and fertilizers on residential lots and will also include a stormwater maintenance plan. The infiltration rates in the pond location more than triple the rate authorized by the City. In his August 9 letter, Mr. Wiltsie requests monitoring of the interim pond which currently accepts water from Tahoma Boulevard and Divisions 3-6. Mr. Wiltsie asserts that

monitoring should occur during the 2007/08 wet season and should establish site specific and in situ pond bottom infiltration rates. He also requests that the City allow him or his staff to observe the interim pond, and provide him the raw and processed monitoring data and monitoring well data from the present through the completion of the Division 3-8 project. The applicant objects to Mr. Wiltsie having access to the interim pond as it's own experts are capable of performing the monitoring. The Examiner has added a condition of approval which requires submittal of the monitoring data as well as the final stormwater design plans for Mr. Wiltsie's review prior to approval by the City. Mr. Wiltsie will have two weeks to review said plans and provide comment to the City. However, the decision to approve or disapprove said plans rests solely with the City. The interim storm drainage facility satisfies the requirements of the 1992 DOE Manual as adopted by the City, and the MPC requires all final storm drainage facilities to meet the 1992 Manual. The project makes appropriate provision for drainage ways.

12. Keith Moxon, attorney at law representing J.Z. Knight, asserts that the City does not have sufficient water availability to provide potable water and fire flow to the site. Mr. Moxon asserts that the applicant and City must show that that adequate water supplies are available to serve the binding site plan concurrently with development, which he asserts is at the preliminary binding site plan stage (Exhibit "3"). Mr. Moxon attaches numerous documents to his letter to include a "Review of Yelm Water Supply and Growth Demand Issues" prepared by Thomas McDonald, Cascadia Law Group. Following Mr. Moxon's submittal of Exhibit "3", the Examiner left the record open for the applicant and the City to respond and the following letters were received:

A. Letter from Clinton Pierpoint and Mark Steepy dated July 31, 2007.
B. Letter from Jeff Schramm dated August 1, 2007.
C. Letter from Curtis Smelser dated August 2, 2007.
D. Letter from Kathleen Callison dated August 3, 2007.
E. Letter from Keith Moxon dated August 10, 2007.
F. Letter from Kathleen Callison dated August 16, 2007.
G. Letter from Curtis Smelser dated August 17, 2007.
H. Letter from Mark Steepy dated August 16, 2007.
I. Letter from Keith Moxon dated August 21, 2007.
J. Letter from Edward Wiltsie dated August 22, 2007.
K. Letter from Kathleen Callison dated August 24, 2007.

Based upon the above letters and attachments thereto the Examiner finds that concurrence, to include the provision of potable water and fire flow, must occur at the final binding site plan approval stage and/or upon submittal of an application for a building permit. At preliminary binding site plan approval, an applicant must show a reasonable expectancy that the water purveyor (in this case the City) will have adequate water to serve the development upon final approval.

13. RCW 36.70A.020, a section of the Growth Management Act (GMA), provides in subsection (12) as follows:

> (12) Public Facilities and Services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards. (emphasis added)

RCW 36.70A.030(12)(13) defines public facilities and services in part as follows:

> (12) "Public Facilities" include...domestic water systems....
>
> (13) "Public Services" include fire protection and suppression...

Thus, GMA requires provision of potable water supplies and fire flow at the time of occupancy and not at the time of preliminary binding site plan approval.

14. The City of Yelm adopted its comprehensive plan and development regulations pursuant to GMA and therefore meets the definition of a "GMA City". Chapter 15.40 YMC entitled "Concurrency Management" provides the following definition:

> "Concurrency" means a determination that the facilities necessary to serve a proposed land development are in place or planned for and properly funded with a reasonable expectation that the facilities will be in place at the time needed to preserve adopted levels of service. (emphasis added)
>
> . . .
>
> "Public facilities" means...water service...[and]...are the public facilities for which the City will make specific findings of concurrency based upon the comprehensive plan.

Thus, the YMC incorporates RCW 36.70A.020(12) and requires concurrency at the time public facilities and services are needed to serve a particular development. Furthermore, Section 15.40.020(A) YMC requires a finding that prior to approval of a division of land for sale, "the reviewing official shall make a written determination of concurrency in connection with facilities proposed or available for the project".

15. For water supply concurrency, Section 15.40.020(B)(2) YMC provides as follows:

> 2. Water.

a. The project is within an area approved for municipal water service pursuant to the adopted water comprehensive plan for the city;

b. Improvements necessary to provide city standard facilities and services are present or are on an approved and funded plan to assure availability in a time to meet the needs of the proposed development. (emphasis added)

The applicant's parcel is located in an area approved for municipal water service, and the documents submitted by the City provide a "reasonable expectation" that domestic water and fire flow will be available to serve the site upon submittal of applications for building permits or for final binding site plan approval. Much of the written evidence in the record addresses the present amount of available water and whether the Department of Ecology and Department of Health will grant the City additional water rights in the future. Such amounts to speculation until the City has made a specific application and agencies have made a specific decision. The Examiner finds most persuasive the letter from Skillings Connelly dated August 9, 2007, entitled "City of Yelm Projected Water Demand", which shows that upon transfer of the golf course and McMonigle water rights and by securing a new water right in 2012, the total cumulative water rights available to the City will far exceed the cumulative water demand. Both Skillings Connelly and the City Development Review Engineer see no need for additional water to serve anticipated development including this project.

16. RCW 58.17.110(2), a section of the State Subdivision Act, provides in part as follows:

> A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that:
>
> a. Appropriate provisions are made for...potable water supplies...and
>
> b. The public use and interest will be served by the platting of such subdivision and dedication.

The above section requires that prior to obtaining preliminary plat (or binding site plan) approval an applicant must establish that the project makes appropriate provision for potable water and fire flow. As previously found, GMA and the YMC consider that the impacts of development occur at the time of occupancy of a development; or in the present case, upon final binding site plan approval or the issuance of a building permit which would authorize construction of residential

dwellings." Furthermore, RCW 19.27.097(1) provides in part as follows:

> Each applicant for a building permit for a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply....

Thus, RCW 58.17.110 requires a finding that a preliminary plat (or binding site plan) makes "appropriate provision" for potable water supplies while RCW 19.27.097(1) requires the actual provision of potable water supplies. Furthermore, Section 15.40.010 YMC defines "concurrency" as a "reasonable expectation" that a public facility will be in place when needed.

17. In Haas, et al., v. Clark County, et al., Division II of the Court of Appeals of Washington addressed the requirements of RCW 58.17.110 in an unpublished opinion dated January 22, 1999. While unpublished opinions cannot be cited as authority, the Court's reasoning supports the comprehensive plan:

> The hearing examiner found that there was insufficient evidence for him to conclude that there would be an adequate supply of potable water to Alice's Wanderland [preliminary plat]. RCW 58.17.110(2) provides that a proposed subdivision "shall not be approved unless" the agency finds that "appropriate provisions are made" for potable water supplies and public health and safety. In addition, because this was a cluster subdivision, it must comply with CCC 18.302.090F which requires the agency to find that "potable water supplies are available". The hearing examiner apparently interpreted these provisions to mean that he must be able to find at the time of preliminary plat approval that the water supply was in existence or guaranteed to be in consistency in the near future. Both the Clark County Director of Planning and Code Administration and the Board recommended approval or the preliminary plat, but made establishing sufficient potable water supplies a condition of final approval. The Superior Court found that at the time of preliminary plat approval, the hearing examiner had only to "set standards for gallonage and pressure to review the lots proposed". Before we can decide if the hearing examiner erroneously concluded that there was not sufficient evidence of potable water, we must decide whether the evidence must show that potable water is immediately available or that it will be available before final approval...

> Neither RCW 58.17.110(2) nor CCC 18.302.090F specifically state whether the potable water requirement must be met before preliminary approval or before final approval. Thus, they are ambiguous and require our interpretation...
>
> RCW 58.17.110(2) and CCC 18.302.090F are most consistent with the interpretation that the finding of adequate potable water supplies need be made only before final approval. Both provisions refer only to findings being made before approval of a proposed subdivision. A development would not be "approved" until final approval is granted, rather than at the time of preliminary plat approval. RCW 58.17.020(4) provides that a "preliminary plat" "is a neat and approximate drawing of a proposed subdivision showing the general layout of streets and alleys, lots, blocks, and other elements of a subdivision consistent with the requirements of this chapter. The preliminary plat shall be the basis for the approval or disapproval of the general layout of a subdivision". In contrast, a "final plat" "is the final drawing of a subdivision and dedication prepared for filing for record with the county auditor and containing all elements and requirements set forth in this chapter and in local regulations adopted under this chapter"...Further, both the statute and the code contemplate conditional approval, which suggests that if a requirement is not fully satisfied at the time of preliminary approval, then meeting this requirement may be made a condition of final approval...and we have previously held that the approving authority is empowered to condition approval of the plat upon compliance with RCW 58.17.110...Conditional approval serves the goal of compliance with the statutory scheme and the county code requirements because it requires the developer to satisfy those requirements before final approval. Therefore, we hold that the requirements contained in RCW 58.17.110(2) and CCC 18.302.090F need not be met until approval of the final plat. (emphasis supplied).

Division III of the Court of Appeals reached the same result in Largent, et al. v. Klickitat County, another unpublished opinion, and cited with approval the case of Topping v. Pierce County Board of Commissioners, 29 Wn. App 781 (1981), as follows:

> The purpose of a preliminary plat is to secure approval of the general "design" of a proposed subdivision and to determine whether the public use and interest will be served by the platting. Although the planning department must determine...whether water supplies [and] sanitary waste disposal...are currently available or whether provisions must be made for the addition of such services,

see also RCW 58.17.110, compliance with specific health regulations applicable to a completed development is not required for approval of a preliminary plat. Essentially, the preliminary plat supplies information not specified by regulation or ordinance. Matters which are specified by regulation or ordinance need not be considered unless conditions or infirmities appear or exist which would preclude any possibility of approval of the plat.

Topping, 29 Wn. App at 783 (citations omitted). The determination of whether the application meets the health regulations is a matter for the local health authority later in the process:

[C]ompliance with specific health regulations is not required for the approval of a preliminary plat; at the time of submission of the preliminary plat, such regulations are only guidelines, not mandates...

Here, the Board's decision regarding the septic system was based on specific health regulations, Conclusion 5 states Mr. Largent did not meet the requirements of WAC 246-272 – 20501. Under Topping, this would appear to be an invalid ground for rejecting the preliminary plat application.

Finally, in Daly Construction Company v. Planning Board of Randolph, 163 NE 2d 27 (1959), the Supreme Court of Massachusetts considered a town planning board's denial of a proposed subdivision of land for the failure of the applicant to show how it would "secure adequate provision for water". The board had notice of an acute shortage of water and water pressure. The Court ruled:

In effect, the board here has denied to the owner the opportunity the subdivide its land, not because of any inpropriety in the proposed plan for its use, but because the supply of water for the town, possibly inadequate unless augmented from new sources, will be further depleted by use in the buildings to be constructed. The board's powers here asserted rest solely upon the provisions of the subdivision control law...

The general tenor of the entire section shows legislative concern primarily with (a) adequate ways to provide access furnished with appropriate facilities and (b) sanitary conditions of lots. Read in context, the words, "securing adequate provision for water," seem to us to mean installation of an adequate system of water pipes rather than an adequate supply of water, which, if not to be supplied from wells or other privately owned sources, is usually a matter of municipal water supply or water company action...

> In the absence of more explicit statutory language, we interpret the authority of planning boards under the existing subdivision control law as not permitting disapproval of an otherwise proper plan on the ground that its execution would tax existing water sources. (emphasis supplied).

The Examiner could find no authority supporting either denial of a preliminary plat or requiring provision of domestic water and fire flow at the time of preliminary plat approval. Therefore, based upon the above authority, conditioning a preliminary plat to provide both domestic water and fire flow prior to final plat approval satisfies the provisions of RCW 58.17.110 and the YMC that require an applicant to show that a proposed preliminary plat makes appropriate provision for the public health, safety, and general welfare for potable water supplies and fire flow.

18. Mr. Moxon asserts that the City must provide 300 gallons of water per day for each equivalent residential unit (ERU) as set forth in Section V(C)(2)(c) of the City Comprehensive Joint Plan with Thurston County. Said section provides in part:

> For planning and concurrency purposes, the City requires 300 gallons per day per connection and 750 gallons per minute peak fire flow capacity in residential areas and Uniform Fire Code criteria for industrial and commercial areas, together with a reserve capacity of 15%...(emphasis added).

Section 13.04.120(C) YMC defines "ERU" as follows:

> (C) "Equivalent Residential Unit (ERU)" means the unit of measurement determined by that quantity of flow associated with a single residential household defined as follows:
>
> (1) ERU measurement shall be an equivalent flow of 900 cubic feet, or less, per month, based on water meter in-flow.(emphasis added)

Since one cubic foot equals 7.48 gallons, the total monthly flow equals 6,732 gallons or 224.4 gallons or less per day in a 30 day month. Such is substantially less than the 300 gallons set forth in the comprehensive plan.

19. The 300 gallons per day set forth in the comprehensive plan is for infrastructure planning purposes and utilized for sizing of pipes, pumps, etc. Furthermore, the Comprehensive Plan also provides in Section V(C)(2)(a):

> ...The city has an on-going program to acquire water rights to

> assure adequate capacity to serve the growing population. Yelm currently has adequate water rights in process to serve the existing population and the anticipated growth for at least 20 years....

Thus, regardless of the ERU standard used, the Comprehensive Plan provides that the City can accommodate anticipated growth for at least 20 years and has an active, on-going program to acquire additional water rights. The Comprehensive Plan does not show an inadequate water supply within the City.

20. Courts and the legislature have not required applicants to show water availability at the time of preliminary plat/binding site plan approval, but only that the City or other purveyor has a reasonable plan to provide such service. In the present case, the City has shown that it is actively pursuing the acquisition of additional water rights and that it has a reasonable expectancy of acquiring such rights. An in-depth, detailed review of a water purveyor or city utility at a quasi-judicial hearing to consider a site specific project is not appropriate. If allowed, such would establish a precedent for investigating a fire department's existing and projected apparatus, budget, personnel, and ability to provide service; a sewer district's financing and ability to provide service; a school district's capital facilities plan and future plans for school construction; a city's public works budget, etc. Such investigations appear far beyond a quasi-judicial proceeding to consider a site specific, 61 unit, multi-family development. Furthermore, if the same investigation does not occur in future site specific cases, can the Examiner consider evidence not in the record and not subject to cross examination in future land use hearings? Such could result in a piece-meal, case-by-case determination or water availability depending upon the evidence presented. Finally, determining that the City will not have sufficient water to serve this project essentially imposes a moratorium upon building throughout the City. Such decisions are within the jurisdiction of the legislative body.

21. In a number of paragraphs within the Transportation Impact Study prepared by Transportation Engineering NW for the overall Tahoma Terra Master Planned Community, the engineer writes:

> ...nine phases of development have been contemplated in this traffic analysis, with the first two phases given a detailed level of traffic analysis to meet the City's SEPA requirements...
>
> This section is not intended to provide a detailed evaluation of traffic impacts of the full project master plan build-out, but rather an assessment of potential mitigation for City consideration as each future phases of the master plan are pursued. A detailed traffic analysis is provided only for the first two phases of development, which is included in a subsequent section of this report....

The City responsible official reviewed the MDNS issued for the overall MPC and

determined that mitigating measures are triggered by trip generation as opposed to specific phases of the proposed development. Furthermore, the official determined that the proposed individual developments within the MPC are virtually identical with those contemplated in the conceptual master plan. The MDNS further provides:

> This threshold determination and adoption of previous environmental documents will be used for all future development permits and approvals within the Conceptual Master Site Plan of Tahoma Terra provided that those permits and approvals are consistent with the application and approval for the Conceptual Master Site Plan.

Thus, even though the traffic engineer did not consider the TIA effective for SEPA purposes for the entire MPC, the responsible official did and utilized it to impose mitigating measures based on traffic generation. Had the Conceptual Master Plan changed, the official could home issued a new MDNS to address the changes. However, since the conceptual plan did not change, the official properly used the original MDNS for the overall MPC.

22. Those in opposition argue that significant development has either been approved or proposed adjacent to the Tahoma Terra MPC and that the TIA did not consider such development. However, the City required the TIAs for the newly proposed development to consider Tahoma Terra traffic. Such resulted in additional mitigation to include the traffic signal at Longmire Street/SR-510. Furthermore, the TIA for the entire MPC is dated February 25, 2005, and thus relatively recent. Significant changes in the area occurring since then were evaluated by the new projects. The MPC will continue to construct traffic improvements based upon future trip generation as evidenced by building permit applications. The environmental official did not err in utilizing the previous MDNS.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.

2. The environmental official appropriately considered the probable, significant, adverse environmental impacts associated with development of the project. Unlike the fact situation in Quality Rock v. Thurston County, 139 Wn. App 125 (2007), the environmental official had all studies and expert letters before him for consideration prior to his decision to utilize the MDNS issued for the overall MPC.

3. The proposed preliminary plat makes appropriate provision for the public health, safety, and general welfare for open spaces, drainage ways, streets, roads, alleys, other public ways, transit stops, potable water supplies, sanitary waste, parks and recreation, playgrounds, schools and school grounds, sidewalks, and safe walking

conditions.

4. The proposed subdivision is in conformity with the R4-6 zone classification applicable in the Tahoma Terra MPC as well as other development regulations adopted specifically therefor and for the City overall.

5. Public facilities impacted by the subdivision are either adequate and available or the City has a plan to finance the needed public facilities which will assure retention of an adequate level of service.

6. The project is within the City's sewer service area which has capacity to serve all lots.

7. The proposed subdivision will serve the public use and interest by providing an attractive location for a single family residential subdivision within a master planned community with significant amenities and therefore should be approved subject to the following conditions:

    1. The conditions of the Mitigated Determination of Non-significance are hereby referenced and are considered conditions of this approval.

    2. Each dwelling unit with the subdivision shall connect to the City water system, pursuant to the terms of the water right conveyances for the Dragt water rights and the Tahoma Valley Golf and Country Club water rights, including the terms for issuance of building permits and water connection fees.

    3. All conditions for cross connection control shall be met as required in Section 246-290-490 WAC.

    4. Each dwelling within the subdivision shall connect to the City S.T.E.P. sewer system. The connection and inspection fees will be established at the time of building permit issuance.

    5. All irrigation systems for planting strips in the Boulevard and collector streets, any large open spaces, and stormwater tracts shall be served by an irrigation system utilizing reclaimed water where available and approved through a reclaimed water users agreement. Civil engineering plans shall identify proposed reclaimed water lines, meters, and valves pursuant to adopted City standards.

    6. The final landscape plan submitted as part of the civil plan review shall include details of the active recreation component of each pocket park and of the community park. The final landscape plans shall meet the standards of Chapter 17.80 YMC as amended in the final master site plan approval. All

landscaping within City right-of-way, including all planter strips in the Boulevard and internal streets, shall include drought tolerant shrubs, a weed barrier, landscaping material, and drip irrigation.

The final landscape plan shall also include the restoration of the planter strips on Longmire Street between the Tahoma Terra Master Planned Community and SR 507 with drought tolerant shrubs, a weed barrier, and landscaping material.

7. The final stormwater plan shall be consistent with the preliminary plan and shall be consistent with the 1992 DOE Stormwater Manual, as adopted by the City of Yelm. Stormwater facilities shall be located in a separate recorded tracts owned and maintained by the homeowners association. The stormwater system shall be held in common by the Homeowners Association and the homeowners agreement shall include provisions for the assessment of fees against individual lots for the maintenance and repair of the stormwater facilities. All roof drain runoff shall be infiltrated on each lot utilizing individual drywells.

8. The civil engineering plans shall include the location of fire hydrants consistent with the Yelm Development Guidelines and applicable fire codes. The plan shall include fire flow calculations for all existing and proposed hydrants and the installation of hydrant locks on all fire hydrants required and installed as part of development.

9. The civil engineering plans shall include street lighting consistent with the final master site plan approval.

10. The civil engineer plans shall include an addressing map for approval by the Building Official.

11. The applicant shall provide a performance assurance device in order to provide for maintenance of the required landscaping for this subdivision, until the homeowners' association becomes responsible for landscaping maintenance. The performance assurance device shall be 150 percent of the anticipated cost to maintain the landscaping for three years.

12. The applicant shall submit monitoring data and the final stormwater design plans to Mr. Wiltsie for his review prior to approval by the City. Mr. Wiltsie shall have two weeks to review said plans and provide comments to the City. However, the decision to approve or disapprove said plans rests solely with the City.

DECISION:

The request for preliminary plat approval for Tahoma Terra Divisions 5 and 6 is hereby granted subject to the conditions contained in the conclusions above.

ORDERED this 9th day of October, 2007.

STEPHEN K. CAUSSEAUX, JR.
Hearing Examiner

TRANSMITTED this 9th day of October, 2007, to the following:

APPLICANT: TTPH 3-8 LLC
4200 6th Avenue SE #301
Lacey, WA 98503

AGENT: KPFF Consulting Engineers
4200 6th Avenue SE #309
Lacey, WA 98503

OTHERS:

Keith Moxon
2025 First Avenue, Ste. 500
Seattle, WA 98115

Matthew Schubart
P.O. Box 192
McKenna, WA 98558

Curt Smelser
1420 5th Avenue Ste. 3010
Seattle, WA 98101

Doug Bonner
8120 Freedom Lane #201
Lacey, WA 98516

City of Yelm
Tami Merriman
105 Yelm Avenue West
P.O. Box 479
Yelm, Washington 98597

CASE NO.: SUB-07-0187-YL (TAHOMA TERRA PHASE II DIVISIONS 5 AND 6)

NOTICE

1. **RECONSIDERATION:** Any interested party or agency of record, oral or written, that disagrees with the decision of the hearing examiner may make a written request for reconsideration by the hearing examiner. Said request shall set forth specific errors relating to:

A. Erroneous procedures;

B. Errors of law objected to at the public hearing by the person requesting reconsideration;

C. Incomplete record;

D. An error in interpreting the comprehensive plan or other relevant material; or

E. Newly discovered material evidence which was not available at the time of the

hearing. The term "new evidence" shall mean only evidence discovered after the hearing held by the hearing examiner and shall not include evidence which was available or which could reasonably have been available and simply not presented at the hearing for whatever reason.

The request must be filed no later than 4:30 p.m. on October 19, 2007 (10 days from mailing) with the Community Development Department 105 Yelm Avenue West, Yelm, WA 98597. This request shall set forth the bases for reconsideration as limited by the above. The hearing examiner shall review said request in light of the record and take such

further action as he deems proper. The hearing examiner may request further information which shall be provided within 10 days of the request.

2. APPEAL OF EXAMINER'S DECISION: The final decision by the Examiner may be appealed to the city council, by any aggrieved person or agency of record, oral or written that disagrees with the decision of the hearing examiner, except threshold determinations (YMC 15.49.160) in accordance with Section 2.26.150 of the Yelm Municipal Code (YMC).

NOTE: In an effort to avoid confusion at the time of filing a request for reconsideration, please attach this page to the request for reconsideration.

OFFICE OF THE HEARING EXAMINER

CITY OF YELM

DECISION ON RECONSIDERATION

CASE NO.: SUB-07-0187-YL (TAHOMA TERRA PHASE II, DIVISIONS 5 AND 6)

APPLICANT: TTPH 3-8 LLC
4200 6th Avenue SE #301
Lacey, WA 98503

AGENT: KPFF Consulting Engineers
4200 6th Avenue SE #309
Lacey, WA 98503

By Report and Decision dated October 9, 2007, the Examiner conditionally approved the request for Binding Site Plan and Planned Residential Development approval for Tahoma Terra Phase II, Divisions 5 and 6. On October 19, 2007, J.Z. Knight, by and through her attorney, Keith E. Moxon, timely filed a Request for Reconsideration. On October 25, 2007, the Examiner circulated Mr. Moxon's reconsideration request to parties of record and their legal representatives and the City of Yelm and received the following responses:

A. Letter from Kathleen Callison, Attorney at Law on behalf of the City of Yelm, dated November 8, 2007.

B. Letter from Curtis R. Smelser, Attorney at Law on behalf of Tahoma Terra Division II, Phase 3 and 4, Divisions V and VI, dated November 8, 2007.

C. Memorandum from Alison Moss, Attorney at Law on behalf of Jack Long, dated November 8, 2007.

Pursuant to a request by Mr. Moxon, objected to by the City and the applicants' attorneys, the Examiner granted Mr. Moxon the opportunity to respond to the reconsideration responses. The Examiner also granted all counsel the opportunity to respond to Mr. Moxon. Mr. Moxon submitted his response on November 14, 2007, and Alison Moss submitted two responses on November 19, 2007, one on behalf of Jack Long and the other on behalf of Windshadow.

Based upon the above documents, the following additional findings are hereby made as follows:

1. The City has provided competent evidence regarding the availability of water, the City's water plan, and the planning process. Evidence in the record establishes that water rights from the Dragt farm have been conveyed to the City and approved by the State Department of Ecology (DOE). Evidence also shows the conveyance of water rights from the Nisqually Golf and Country Club to the City. Evidence also shows that the City has secured a lease of the McMonigle farm water rights. Evidence also shows that the City has a plan in place to submit an application for transfer of these additional water rights. Furthermore, the City has shown that it is actively pursuing the acquisition of additional water rights and that it has a reasonable expectancy of acquiring such rights. If DOE does not approve future applications, the City may need to explore other options to provide potable water and fire flow to the City as a whole.

2. While State law and the Yelm Municipal Code require potable water supplies at final plat approval and building permit approval, the Examiner has added a condition of approval requiring such. However, the balance of the conditions of approval requested by Mr. Moxon in his response are beyond the Examiner's authority and interfere with the City's ability to manage his public water system. Furthermore, the proposed conditions require actions by the City beyond the control of the applicant and are therefore not proper as the applicant cannot require the City to take such actions. These conditions would prohibit the applicant from getting final approval of its project even if it had satisfied all requirements for final plat approval.

3. The Examiner has not considered additional issues raised in Mr. Moxon's Reply to Responses To Motions as such were not raised either at the hearing or during the reconsideration period. However, the Binding Site Plan (BSP) process parallels the subdivision process with preliminary and final site plan approval. The site plan considered at the public hearing is akin to a preliminary plat and not a final plat. Furthermore, the Planned Residential Development (PRD) process set forth in Chapter 17.60 YMC provides for a preliminary and final review process similar to the platting process.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.

2. The following condition is added:

> The applicant must provide a potable water supply adequate to serve the development at final plat approval and/or prior to the issuance of any building permit except as model homes as set forth in Section 16.04.150 YMC.

DECISION:

The Request for Reconsideration is hereby denied with the exception of the addition of the condition of approval set forth in the conclusions above.

ORDERED this 7th day of December, 2007.

STEPHEN K. CAUSSEAUX, JR.
Hearing Examiner

TRANSMITTED this 7th day of December, 2007, to the following:

APPLICANT: TTPH 3-8 LLC
4200 6th Avenue SE #301
Lacey, WA 98503

AGENT: KPFF Consulting Engineers
4200 6th Avenue SE #309
Lacey, WA 98503

OTHERS:

Keith Moxon
2025 First Avenue, Ste. 500
Seattle, WA 98115

Matthew Schubart
P.O. Box 192
McKenna, WA 98558

Curt Smelser
1420 5th Avenue Ste. 3010
Seattle, WA 98101

Doug Bonner
8120 Freedom Lane #201
Lacey, WA 98516

Alison Moss
2183 Sunset Avenue SW
Seattle, WA 98116

Kathleen Callison
802 Irving Street SW
Tumwater, WA 98512

City of Yelm
Tami Merriman
105 Yelm Avenue West
P.O. Box 479
Yelm, Washington 98597

CASE NO.: SUB-07-0187-YL (TAHOMA TERRA PHASE II, DIVISIONS 5 AND 6)

NOTICE

APPEAL OF EXAMINER'S DECISION: The final decision by the Examiner may be appealed to the city council, by any aggrieved person or agency of record, oral or written that disagrees with the decision of the hearing examiner, except threshold determinations (YMC 15.49.160) in accordance with Section 2.26.150 of the Yelm Municipal Code (YMC).

NOTE: In an effort to avoid confusion at the time of filing a request for reconsideration; please attach this page to the request for reconsideration.

APPENDIX - 2

EXHIBIT A

City of Yelm
Resolution No. 481

A RESOLUTION AFFIRMING THE HEARING EXAMINER'S APPROVAL OF PRELIMINARY SUBDIVISIONS AND BINDING SITE PLANS FOR WINDSHADOW I (SUB-05-0755-YL & PRD-05-0756-YL), WINDSHADOW II (SUB-07-0128-YL & PRD-07-0129-YL), WYNDSTONE (BSP-07-0094-YL), BERRY VALLEY I (BSP-07-0097-YL & PRD-07-0098-YL), AND TAHOMA TERRA PHASE II, DIVISIONS 5&6 (SUB-07-0187-YL)

WHEREAS, the Yelm City Council held a closed record hearing on January 22, 2008, regarding appeals by JZ Knight of the Hearing Examiner's approval of preliminary subdivision and preliminary binding site plan applications related to five development proposals within the Berry Valley area of Yelm; and

WHEREAS, the Council considered the appellant's notice of appeal and accompanying memorandum, response memoranda filed by the City of Yelm Community Development Department and representatives of Tahoma Terra, Windshadow I, and Berry Valley I, a reply by appellant Knight, the Hearing Examiner's decisions, reconsideration requests filed by Knight and the Hearing Examiner's decisions on reconsideration; and

WHEREAS, the Council heard oral arguments from the parties during a closed record hearing on January 22, 2008, and

WHEREAS, the Council reviewed the record before the Hearing Examiner prior to the closed record appeal hearing, an index of which is included as Attachment A to this resolution;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Yelm, Washington, that the Hearing Examiner's reports and decisions and orders on reconsideration in the matter of Windshadow I (SUB-05-0755-YL & PRD-05-0756-YL), Windshadow II (SUB-07-0128-YL & PRD-07-0129-YL), Wyndstone (BSP-07-0094-YL), Berry Valley I (BSP-07-0094-YL), and Tahoma Terra Phase II, Divisions 5&6 (SUB-07-0187-YL) are hereby affirmed; and

BE IT FURTHER RESOLVED that the Hearing Examiner's Findings of Fact are hereby affirmed and the Examiner's Conclusions of Law are hereby affirmed and amended as follows:

Conclusions of Law

1. This matter comes before the City Council on appeals filed by JZ Knight of decisions by the Yelm Hearing Examiner and is properly before the Council as a closed record appeal.

2. The City Council acts in an appellate capacity when reviewing a decision of the Hearing Examiner and the Council's review is based solely upon the evidence presented to the Examiner, the Examiner's report and decisions, the notices of appeal, and submissions by the parties. The City Council may "adopt, amend and adopt, reject, reverse, and amend conclusions of law and the decision of the

Hearing Examiner, or remand the matter for further consideration." Section 2.26.160 (D) YMC.

3. JZ Knight has not shown that she will actually suffer any specific and concrete injury in fact, within the zone of interests protected by the legal grounds for her appeals, relating to the sole issue raised by her appeals, whether the appropriate provision for potable water has been made for the proposed developments. Therefore, Knight is not an aggrieved person with standing to appeal the Examiner's decision to the City Council. Notwithstanding the City Council's conclusion that Knight lacks standing to appeal, the City Council contingently decides Knight's appeals so that remand and rehearing will not be necessary if, in the future, there is a final judicial determination that Knight had standing to bring these appeals.

4. Knight did not carry her burden of showing that the Hearing Examiner failed to follow prescribed processes; erroneously interpreted applicable law; made findings, conclusions, and decision that were not supported by substantial evidence; or was clearly erroneous in his application of law to the facts. The Hearing Examiner's findings, conclusions, and decision were supported by substantial evidence submitted through the land use hearing process, were not legally erroneous, and to the extent relevant to this appeal, the Findings and Conclusions of the Hearing Examiner are hereby adopted.

5. The Yelm Hearing Examiner and the City Council do not have jurisdiction to adjudicate water rights. [alleged error of fact 3].

6. The Hearing Examiner properly considered all the evidence submitted as part of the open record hearing on these matters and found that the evidence presented by the City regarding water rights that the City expects will be available to serve these subdivisions provided sufficient basis to support his decision to approve the developments. The Hearing Examiner is charged with determinations of credibility and the weight to give evidence and such determinations may be overturned on appeal only if they are not supported by some substantial evidence. [alleged errors of fact 1, 2, 4, 6, and 7].

7. The Department of Ecology (Ecology) reviews water rights as part of the approval of a Comprehensive Water System Plan (WSP) by the Washington Department of Health. Ecology, in its 2002 comment letter on the WSP, agreed with the assessment of water rights included in the WSP. Since that time, Ecology has stated a number of conflicting opinions relating to Yelm's water rights outside of the official Comprehensive Water System planning process. Neither Ecology, nor the Dept. of Health, which is the regulatory agency charged with overseeing water system planning and compliance, has taken any enforcement action against the City in relation to the compliance of the Yelm water system with applicable laws or regulations or the validity or adequacy of its water rights. No superior court has adjudicated the City's water rights inconsistently with their characterization in the City's WSP. In these circumstances, the City has reasonably relied on its approved and adopted

Water System Plan to administer its water system. [alleged errors of fact 3 and 6].

8. A true procedural error, such as defective notice, which is harmless or does not cause actual prejudice is insufficient to overturn the Examiner's decisions. Knight does not show any such prejudice as a result of her alleged procedural errors. [alleged procedural errors 1 through 6].

9. Knight does not provide any basis for finding the process was irregular but rather, in effect, asserts substantive arguments regarding the evidence considered by the Examiner , and the sufficiency of evidence in the record to support the Examiner's conclusions. [alleged procedural errors 3 through 6].

10. The Examiner reviewed an unpublished decision of the Washington Court of Appeals and a Massachusetts case as part of his consideration. The Examiner explicitly recognized that he could not cite these cases as controlling legal authority, and instead properly considered them as persuasive authority consistent with his interpretation of state statutory and local ordinance provisions related to the requirement of determining whether appropriate provision had been made for potable water at the preliminary plat or preliminary binding site plan stage of regulation. [alleged procedural errors 1 and 2].

11. After the close of the July, 2007 public hearing before the Hearing Examiner, Knight requested that the hearing be re-opened and offered the second McDonald Declaration in support of that request. When the Examiner denied the request to re-open the hearing, the materials submitted after the close of the public hearing were properly excluded from the record. Nevertheless, these materials were included in the record provided to and considered by the Council in these appeals. [alleged omission from the record 1].

12. Knight has failed to identify any provision of law that requires the City to provide evidence as part of the record in applications for preliminary plat approval or preliminary binding site plan approval relating to documentation of the number of current water connections, the amount of present demand for potable water, the water rights currently held by the City, or the amount of projected demand for potable water upon actual future development of the proposed preliminary plats or binding site plans. [alleged omission from the record 2].

13. Knight has not met her burden to show that the interpretation of the City Comprehensive Plan and development regulations by the City of Yelm and its Hearing Examiner is erroneous, particularly since the agency's interpretation is entitled to deference absent a compelling indication that the City's interpretation conflicts with regulatory intent or is in excess of the City's authority. Knight has provided no competent or compelling indication or evidence that the Examiner's interpretation of the Comprehensive Plan was erroneous. [alleged errors of interpretation of the Comprehensive Plan 1 through 3].

14. The appropriate standard for the purpose of determining water availability at the time of preliminary subdivision or preliminary binding site plan approval is found at Section 13.04.120 YMC which, as concurrency standards are development

regulations, prevails over any inconsistent comprehensive plan provisions. [alleged errors of interpretation of the Comprehensive Plan 1 through 3].

15. The exact quantity of water rights that the City currently holds, which recently has been disputed by Knight, is immaterial because the City presented evidence, upon which the Hearing Examiner reasonably relied, that substantial additional water rights have been obtained by the City and that their transfer is reasonably expected to be approved the State Department of Ecology (Ecology), and that substantial new water rights are the subject of water rights applications pending before Ecology. On the basis of such evidence, the Hearing Examiner concluded that the requirements of Section 58.17.110 RCW and Sections 15.40.010 and .020 YMC were satisfied by evidence supporting a reasonable expectation that ample water will be available at the time that water is required upon connection and entered written findings that appropriate provision was made for potable water. [alleged errors of interpretation of the Comprehensive Plan 1 through 3].

16. The City has made appropriate findings of water availability at the appropriate points in the application process. Title 16 YMC requires, at the time the Hearing Examiner considers a preliminary subdivision or preliminary binding site plan application, a determination that water is reasonably expected to be available at the time of future development. Chapter 15.40 YMC requires a determination that the utility infrastructure be in place at the time of or within six years of the development. Chapter 19.27 RCW requires availability of water service at the time of building permit issuance and, thus, by it's explicit terms, does not apply to preliminary subdivision or preliminary binding site plan applications. [alleged provisions of law violated 1, 2, 3 (binding site plan and subdivision appeals), 4 (binding site plan and subdivision appeals), and 5 (subdivision appeals)].

17. Knight impermissibly raises a new issue upon appeal, alleging the Examiner's decision is inconsistent with "Ordinance 351". This issue is untimely and was waived because it was not properly raised before the Examiner.

18. Moreover, Resolution 351 was repealed by the City Council through the adoption of Resolution 380 on December 9, 1998. [alleged provision of law violated (subdivision appeals) and 6 (binding site plan appeals)].

PASSED and signed in authentication on this 12th day of February, 2008

Ron Harding, Mayor

Authenticated:

Janine Schnepf, City Clerk

APPENDIX - 3

☐ EXPEDITE
☐ No hearing set
☐ Hearing is set
Date:
Time:
Judge/Calendar:

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH
08 MAR -4 PM 12: 07
BETTY J. GOULD, CLERK
BY DEPUTY

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

JZ KNIGHT,

Petitioner,

v.

CITY OF YELM; WINDSHADOW LLC; ELAINE C. HORSAK; WINDSHADOW II TOWNHOMES, LLC; RICHARD E. SLAUGHTER; REGENT MAHAN, LLC; JACK LONG; PETRA ENGINEERING, LLC; SAMANTHA MEADOWS LLC; TTPH 3-8, LLC,

Respondents.

08-2-00489-6

No.

LAND USE PETITION

Petitioner JZ Knight hereby brings this Land Use Petition pursuant to Chapter 36.70C RCW, the Land Use Petition Act ("LUPA"), to challenge the City of Yelm's decision (Resolution No. 481, adopted February 12, 2008) approving five proposed subdivisions: SUB-05-0755-YL & PRD-05-0756-YL (Windshadow I); SUB-05-07-0128-YL & PRD 07-0129-YL (Windshadow II); BSP-07-0094 (Wyndstone); BSP-07-0097-YL & PRD-07-0098-YL (Berry Valley I); SUB-07-0187-YL (Tahoma Terra Phase II, Division 5 & 6).

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1. Name and Mailing Address of the Petitioners

JZ Knight
14507 Yelm Highway SE
Yelm, WA 98597

2. Name and Mailing Address of Petitioner's Attorney

Keith E. Moxon
GordonDerr LLP
2025 First Avenue, Suite 500
Seattle, WA 98121-3140

3. Name and Mailing Address of the Local Jurisdiction Whose Land Use Decision is at Issue

City of Yelm
105 Yelm Avenue West
PO Box 479
Yelm, WA 98597

4. Identification of the Decision Making Body, Together with a Duplicate Copy of the Decision

City of Yelm
105 Yelm Avenue West
PO Box 479
Yelm, WA 98597

A copy of the City's final Decision, Resolution No. 481, adopted on February 12, 2008, is attached as **Exhibit A.**

5. Identification of Each Person to be Made a Party Under RCW 36.70C.040(2)(b)-(d)

Windshadow LLC
315 - 39th Avenue SW, Suite 6
Puyallup, WA 98373

Windshadow LLC
310 - 29th Street NE
Puyallup, WA 98372

Elaine C. Horsak
14848 Berry Valley Road SE
Yelm, WA 98597

Windshadow II Townhomes, LLC
310 - 29th Street NE
Puyallup, WA 98372

Richard E. Slaughter
14940 Berry Valley Road SE
Yelm, WA 98597

Regent Mahan LLC
3077 - 20th Street, Suite B
Fife, WA 98424

Jack Long
111 - 5th Street NE
Auburn, WA 98002

Samantha Meadows LLC
14747 Berry Valley Road SE
Yelm, WA 98597

Petra Engineering LLC
535 Dock Street, Suite 213
Tacoma, WA 98402

TTPH 3-8 LLC
4200 - 6th Avenue SE, Suite 301
Lacey, WA 98503

TTPH 3-8 LLC
4200 - 6th Avenue SE, Suite 401
Lacey, WA 98503

6. Facts Demonstrating that the Petitioner Has Standing to Seek Judicial Review Under RCW 36.70C.060

6.1 Petitioner's interest in the City of Yelm's decision regarding these five proposed subdivisions is real and substantial. Petitioner is a property owner and taxpayer in the City of Yelm. Petitioner owns undeveloped property in the City of Yelm's water service area and has an interest in the development of this property, including an interest in obtaining water connections to the City of Yelm's municipal water system. Petitioner's personal and property rights and interests will be directly and adversely affected by the City's decision, which would result in substantial new development and new water

demand in excess of the City's ability and legal rights to provide adequate water service. The effect would be a direct and adverse impact on Petitioner's ability to obtain future water service for her property within the City of Yelm's water service area.

6.2 In addition, Petitioner owns property and resides within the City of Yelm's Urban Growth Area (UGA) near all of the five proposed subdivisions. Petitioner has significant water rights approved by the Department of Ecology for her property. These water rights are constitutionally protected water rights administered under a permit system implemented by the Department of Ecology. Petitioner's water rights have priority over, and are protected against impairment by, all subsequent new uses of water, including new water rights and changes to all existing water rights, such as would be required to serve the proposed subdivisions.

6.3 Petitioner is entitled to the protection of a permit system that requires all water uses to be authorized under the State's permit system as required by Washington water law. *See* Chapters 43.21A, 43.27A, 90.03, and 90.44 RCW. This permit process allows Petitioner to participate in the required investigation and determination of water availability related to proposed new and revised water rights in order to avoid impairment to senior water rights and to protect the public interest.

6.4 Petitioner's property rights and interests with respect to Petitioner's property and Petitioner's water rights are directly and adversely affected by the City's decision, which would authorize new water demand and use without legal water rights in violation of Petitioner's rights under the water code, including the right to protect her water use from impairment. As an existing and senior water right holder, Petitioner would suffer real and substantial injury from the City's approval of these subdivisions without adequate evidence of water availability, because the water demand from these

subdivisions will result in a water withdrawal from the aquifer serving Petitioner's property to the detriment of Petitioner's personal and property rights.

6.5 The decision by the City of Yelm to approve the five proposed subdivisions that are the subject of this appeal will result in an "immediate, concrete, and specific injury" to Petitioner. The injury to Petitioner will directly result from the City's approval of the five proposed subdivisions. The interest she seeks to protect is within the zone of interests the statute was designed to protect. The Court has the ability and the authority to prevent the injury to Petitioner and others by reversing the City's decision to approve the five proposed subdivisions.

6.6 Petitioner has exhausted her administrative remedies to the extent required by law, because she appealed the Hearing Examiner's decision on each of the five proposed subdivisions to the City of Yelm City Council, which issued a final decision on February 12, 2008.

7. A Separate and Concise Statement of Each Error Alleged to Have Been Committed

7.1 The City of Yelm's final decision on these five proposed subdivisions is an erroneous interpretation of the law, is not supported by substantial evidence in the record and is a clearly erroneous application of the law to the facts because the decision fails to comply with the requirements of State subdivision law (Chapter 58.17 RCW) and local subdivision and binding site plan code requirements (Yelm Municipal Code Chapter 16.12 and Yelm Municipal Code Chapter 16.32).

7.2 The City of Yelm's final decision on these five proposed subdivisions is an erroneous interpretation of the law, is not supported by substantial evidence in the record and is a clearly erroneous application of the law to the facts because the decision fails to

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comply with planning and concurrency requirements of the Growth Management Act (Chapter 36.70A RCW) and the "concurrency management" requirements of Yelm Municipal Code Chapter 15.40.

7.3 The City of Yelm's final decision on these five proposed subdivisions is an erroneous interpretation of the law, is not supported by substantial evidence in the record and is a clearly erroneous application of the law to the facts because the decision is not supported by, and is inconsistent with, the City's Comprehensive Plan and the City's Water System Plan (2002 Comprehensive Water Plan).

7.4 The City of Yelm's final decision on these five proposed subdivisions is an erroneous interpretation of the law, is not supported by substantial evidence in the record and is a clearly erroneous application of the law to the facts because the City relied on erroneous information regarding its legal water rights in making determinations of current and future potable water supplies.

7.5 The City of Yelm's final decision on these five proposed subdivisions is an erroneous interpretation of the law, is not supported by substantial evidence in the record and is a clearly erroneous application of the law to the facts because the City failed to provide reasonable and non-speculative evidence of an adequate future potable water supply to serve these five proposed subdivisions.

7.6 The City of Yelm's final decision on these five proposed subdivisions is an erroneous interpretation of the law, is not supported by substantial evidence in the record and is a clearly erroneous application of the law to the facts because the City has failed to

provide any reasonable documentation of (a) current water service connections, (b) committed (but not yet connected) water service connections, or (c) estimated water demand attributable to previously approved residential and commercial development projects, all of which are necessary to make reasonable determinations of future water demand and reasonable determinations of the City's ability to provide water to serve the five proposed subdivisions.

7.7 The City of Yelm's final decision on these five proposed subdivisions is an erroneous interpretation of the law, is not supported by substantial evidence in the record and is a clearly erroneous application of the law to the facts because the City's decision fails to require evidence of water availability at the time of final subdivision approval.

7.8 The City of Yelm's final decision on these five proposed subdivisions is an erroneous interpretation of the law, is not supported by substantial evidence in the record and is a clearly erroneous application of the law to the facts because the City has failed to require compliance with SEPA and other conditions imposed on these proposed subdivisions in the City's prior land use approvals.

7.9 The City of Yelm's final decision on these five proposed subdivisions is an erroneous interpretation of the law, is not supported by substantial evidence in the record, is a clearly erroneous application of the law to the facts, and is the result of unlawful procedure and failure to follow a prescribed process, because the City Council's public hearing and final decision on Petitioner's appeal were not confined to the record.

7.10 The City of Yelm's final decision on these five proposed subdivisions is an erroneous interpretation of the law, is not supported by substantial evidence in the record, is a clearly erroneous application of the law to the facts, and is the result of unlawful procedure and failure to follow a prescribed process, because the City denied Petitioner the right to make objections at the City Council closed record public hearing to evidence presented by applicants and City representatives that was not included in the record submitted to the City Council.

8. A Concise Statement of Facts Upon Which Petitioner Relies to Sustain the Statements of Error

8.1 In 2002, the City of Yelm adopted its current Water System Plan for its municipal water system (City of Yelm Comprehensive Water Plan). This plan was approved by the Washington Department of Health on September 16, 2002. The Department of Health's approval letter stated:

> This approval does not provide any guarantee and should not be considered to provide any guarantee concerning legal use of water or subsequent water rights decisions by the Department of Ecology. Ecology's comment letter dated April 26, 2002, indicates that there are uncertainties or deficiencies regarding your water rights. ... ... This [Department of Health] approval of your WSP [water system plan] does not affect any uncertainties or deficiencies regarding your water rights or the resolution of those uncertainties or deficiencies. Depending on Ecology's future action on your water rights, additional planning or other submittals may be required by the Department of Health.

8.2 The City's 2002 Water System Plan recognizes that the City's ability to supply water service to future customers will depend upon the City obtaining additional water rights.

8.3 The City's 2002 Water System Plan adopts water service policies including a policy that "[t]ax parcels established after the date of adoption [of the 2002 Water

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System Plan] will not be provided with City water service until additional water resources are obtained."

8.4 The City's Water System Plan adopts an ERU (Equivalent Residential Unit) value of 271 gallons per day (GPD), a value that does not include water lost or otherwise wasted by the system, typically 10 percent.

8.5 The City's 2002 Water System Plan notes that future development within the southwest Yelm master planned community would require the developer to provide the City with sufficient water rights for development as well as the necessary infrastructure to supply water to the development.

8.6 The City's 2002 Water System Plan specifically states that an update to the 2002 Water System Plan "will be required for approval of the new master planned community."

8.7 The City's 2002 Water System Plan contains the following statement under Chapter 3 (System Analysis), Section 4 (Summary of System Deficiencies):

> **Water Rights**
>
> The City needs to acquire additional water rights to continue to meet customer demand. Chapter 4 of this report identifies the existing water rights and the estimated amount of new water rights required for future growth. The estimated additional water rights that are needed by the City to meet future demand have been identified in Chapter 4.

8.8 Chapter 4 of the 2002 Water System Plan acknowledges that "[i]t is becoming increasingly difficult, if not impossible, to obtain new or expanded water rights from DOE [Department of Ecology]."

Table 4-3 of the 2002 Water System Plan included the following table summarizing current and projected water right requirements.

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Table 4-3. Current and Projected Water Right Requirements[1]			
	2001	2007	2021
Existing Water Rights	676 acre-ft	676 acre-ft	676 acre-ft
Projected Water Volume	687 acre-ft	895 acre-ft	1,659 acre-ft
New Water Rights Required	11 acre-ft	219 acre-ft	983 acre-ft

8.9 The City's Water System Plan acknowledges the magnitude of this future water rights problem and specifically states the City's intent to ensure that water rights will be in place (approved by Ecology) prior to project acceptance for the master planned community in southwest Yelm.

> The City is acutely aware that additional water rights are necessary to meet future demands. The City requires that, prior to the approval of any project in the MPC, sufficient water rights must be provided to the City by the project proponents to meet the demands of proposed developments. Prior to project acceptance, water rights need to be perfected, beneficial use demonstrated and approved for transfer by the DOE.
>
> *WSP, p.4-14 (emphasis added)*

8.10 The "System Reliability" section of Chapter 4 of City's 2002 Water System Plan includes the following statement: "The City of Yelm does not have sufficient water rights to meet the projected future demand."

8.11 Table 4.2 of the City's 2002 Water System Plan summarizes the City's existing water rights and "potential" City water rights. Included in the list of "potential" City water rights are three wells located on the Thurston Highlands property with potential yields of 2000 afy[2], 3,500 afy and 3,500 afy, respectively.

8.12 The City's 2002 Water System Plan includes an evaluation of its existing water rights.

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[1] One acre-foot of water is the volume of water required to cover one acre of land to a depth of one foot (43,580 cubic feet), which is equivalent to 325,851 U.S. gallons.
[2] afy = acre-feet per year

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Well No.	Certificate No	Volume	
1		145 afy	
2		112 afy	Supplemental but not additive to the water rights of Well No. 1
3A	G2-26041C	356 afy	"The total quantity under all rights [Well No. 1, Well No. 2, and Well No. 3A] shall not exceed 501 acre-feet."
3A	G2-22969	63 afy	

8.13 Based on this water rights information, the City's total water rights at the time of the 2002 Water System Plan totaled 564 afy (501afy plus 63 afy). The City acknowledges this limitation on page 4-11 of the Water System Plan in its recommendation that approval of the Department of Ecology be requested to remove the maximum water rights withdrawal limit of 501 afy that is shown on certificate G2-26041C (Well No. 3A). The City claims that the water rights listed in its 2002 Water System Plan should total 676 afy. This claim ignores the City's admission that the limitation of 501 afy for the first three water rights is in effect and "should be removed from the water rights record." The City has not taken any action to remove the total water rights limit of 501 acre-ft for the first three certificates from its water rights record.

8.14 With respect to the potential water rights available from the three Thurston Highlands wells, the City's 2002 Water System Plan concludes that "until [the Department of Ecology] begins to issue new water rights for the Nisqually Basin, it is unlikely that a new well source will be approved and water rights granted."

8.15 On March 31, 2005, Tahoma Terra LLC submitted an application for approval of a 220-acre Master Planned Community of up to 1200 residential units.

8.16 On May 26, 2005, the City of Yelm issued a SEPA (State Environmental Policy Act) threshold determination for the Tahoma Terra Master Planned Community. The City's "mitigated determination of non-significance" incorporated a condition from the environmental impact statement for the southwest Yelm annexation area stating that developers within the annexation area would be required to provide water rights sufficient to serve the development of the property. The City's SEPA determination also required that final subdivision approval of any phase of the Tahoma Terra development (beyond the first 89 lots) would not be granted without the Washington Department of Ecology approval of a transfer of water rights sufficient to serve the proposed development.

8.17 On August 2, 2005, the Hearing Examiner issued a decision approving the conceptual master site plan for Tahoma Terra subject to a number of conditions. Condition 6 required that "prior to approval of any residential development west of Thompson Creek, the neighborhood commercial center should be improved and ready for the construction of commercial buildings." The Hearing Examiner also adopted the conditions of the City's SEPA determination issued on May 26, 2005, including the restriction on development beyond the first 89 lots prior to the conveyance of water rights sufficient to serve the proposed development.

8.18 On December 26, 2006, the City of Yelm recorded a transfer of water rights approved by the Department of Ecology, in the amount of 155.66 afy (the Dragt water rights). This brought the City's total water rights to 719.66 afy.

8.19 On February 9, 2007, Regent Mahan, LLC submitted an application to divide 4.89 acres into a 66 unit townhome development (Wyndstone).

8.20 On February 23, 2007, Petra Engineering LLC on behalf of owner Jack Long submitted an application to develop 4.6 acres into 61 units of multi-family residential development (Berry Valley Phase I).

8.21 On February 28, 2007, Windshadow II Townhomes, LLC submitted a preliminary plat application to develop 24 units of four-plex townhome development on property owned by Richard E. Slaughter (Windshadow II).

8.22 On March 12, 2007, Windshadow LLC submitted a preliminary plat application to develop property owned by Elaine C. Horsack totaling 30.1 acres into 219 residential units, including 56 attached townhome four-plex units and 163 single family lots (Windshadow I).

8.23 On April 27, 2007, TPH 3-8 LLC submitted a preliminary plat application to divide 32.2 acres of property into 198 single family lots (Tahoma Terra, Divisions 5-6).

8.24 Three of the proposed projects (Windshadow I, Windshadow II, and Tahoma Terra) requested preliminary plat approval under Yelm Municipal Code ("YMC") Chapter 16.12. Two of the proposed projects (Wyndstone and Berry Valley I) requested binding site plan approval under YMC Chapter 16.32. Collectively, these five proposed subdivisions would add 568 units of residential development.

8.25 The City of Yelm's municipal code requires that a water supply determination must be made as a condition of approval for both preliminary plats and

proposed binding site plans. Under the City of Yelm's code, a proposed preliminary plat or binding site plan:

> **shall not be approved unless the decision-maker [the Hearing Examiner] makes written findings that:**
> - **Appropriate provisions are made for the public health, safety and general welfare [including] ... potable water supplies ...;**
> - **The public interest will be served ...;**
> - **Public facilities impacted by the proposed [subdivision or binding site plan] will be adequate and available to serve the subdivision concurrently with the development or a plan to finance needed public facilities in time to assure retention of an adequate level of service (*YMC 16.12.170; YMC 16.32.065*).**

8.26 In June of 2007, in response to a public records request asking for the number of service connections currently maintained by the City, the City's Community Development Director informed the Petitioner that the City does not maintain a master list of the total number of water service connections currently committed by the City.

8.27 Public hearings on each of the five proposed subdivisions were held before the City's Hearing Examiner on July 23, 2007. The City and the applicants provided no water availability documentation to the Hearing Examiner at these public hearings. Petitioner provided extensive documentation to the Hearing Examiner showing that there were significant problems and "data gaps" related to the City of Yelm's ability to provide an adequate potable water supply to serve the five proposed subdivisions.

8.28 The City's Community Development Director testified at the public hearings that the City makes water availability determinations "in the staff report [for each project] as part of the concurrency analysis." However, the concurrency analysis in the City's staff report for each project does not include any fact-based determination regarding adequacy and availability of a potable water supply.

8.29 Because the City and the applicants had provided no documentation of water availability for the public hearing, the Hearing Examiner agreed to leave the record

open to allow the City and the applicants to provide water availability information and to give the Petitioner an opportunity to respond. Post-hearing submissions to the record are listed by the Hearing Examiner in each Report and Decision of the Hearing Examiner dated October 9, 2007. *Hearing Examiner Report and Decision – Windshadow I, Ex. 1-13; Windshadow II, Ex. 1-13; Wyndstone, Ex. 1-14; Berry Valley, Ex. 1-15; Tahoma Terra, Ex. 1-20.* Additional post-hearing submissions to the record are identified in the Hearing Examiner's Decision on Reconsideration dated December 7, 2007.

8.30 The Hearing Examiner approved each of the five proposed subdivisions. In his findings regarding water availability, the Hearing Examiner relied on one document provided by the City of Yelm suggesting that the City might achieve six-fold increase in its total water rights within four years - from 719.66 afy in 2007 to 4186 afy in 2012. No evidence was offered by the City in support of the reasonableness of this speculative assumption, and this assumption is directly contrary to the City's current Water System Plan, which describes the acquisition of such "potential" water rights as "unlikely."

8.31 The City's evidence shows that the City exceeded its water rights in 2006 and 2007 and has not accounted for the water supply that will be needed to serve other previously approved projects.

8.32 Petitioner filed a timely appeal of each of the five Hearing Examiner decisions approving the proposed subdivisions. These appeals were consolidated for hearing before the Yelm City Council on January 22, 2007.

8.33 The City of Yelm issued a final decision approving the five proposed subdivisions on February 12, 2008.

9. Request for Relief, Specifying the Type and Extent of Relief Requested

Consistent with RCW 36.70C.140, Petitioner therefore respectfully requests that the Court enter:

9.1 An order pursuant to RCW 36.70C.080 setting an initial hearing on jurisdictional and preliminary matters;

9.2 An order requiring the City of Yelm to submit to the Court a certified copy of the complete record in this matter;

9.3 An order granting a stay of action pending review pursuant to RCW 36.70C.100;

9.4 An order granting Petitioner's Land Use Petition and reversing the City of Yelm's decision issued on February 12, 2008, which approved the five proposed subdivisions that are the subject matter of this Petition;

9.5 An order granting relief as deemed necessary by the Court to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction pursuant to RCW 36.70C.140;

9.6 A judgment for costs and attorneys' fees to Petitioner as may be allowed by law; and

9.7 Such other relief as the Court deems just and equitable.

Dated this 3rd day of March, 2008.

Respectfully submitted,

GORDONDERR LLP

By: _____
Keith E. Moxon, WSBA #15361
Attorney for Petitioner

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APPENDIX - 4

☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: November 7, 2008
Time: 9:00 a.m.
Judge/Calendar: Chris Wickham

FILED
SUPERIOR COURT
THURSTON COUNTY
'08 NOV -7 P2:05
BY _____ DEPUTY

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

J Z KNIGHT,

Petitioner,

v.

CITY OF YELM; WINDSHADOW LLC; ELAINE C. HORSAK; WINDSHADOW II TOWNHOMES, LLC; RICHARD E. SLAUGHTER; REGENT MAHAN, LLC; JACK LONG; PETRA ENGINEERING, LLC; SAMANTHA MEADOWS LLC; TTPH 3-8, LLC,

Respondents.

No. 08-2-00489-6

JUDGMENT FOR PETITIONER JZ KNIGHT

[PROPOSED]

THIS MATTER came before the Court on the petition of Petitioner JZ Knight pursuant to Chapter 36.70C RCW, the Land Use Petition Act ("LUPA"). Petitioner challenges the City of Yelm's decision (Resolution No. 481, adopted February 12, 2008) approving five proposed subdivisions: SUB-05-0755-YL & PRD-05-0756-YL (Windshadow I); SUB-05-07-0128-YL & PRD 07-0129-YL (Windshadow II); BSP-07-0094 (Wyndstone); BSP-07-0097-YL & PRD-07-0098-YL (Berry Valley I); SUB-07-0187-YL (Tahoma Terra Phase II, Division 5 & 6).

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The Court received the evidence contained in the record, considered the pleadings filed in the action and heard the oral argument of the parties' counsel at a hearing on October 1, 2008. On October 7, 2008, the court rendered a letter opinion in favor of the Petitioner JZ Knight, granting her land use petition. The Court made findings of fact and conclusions of law on November 7, 2008, which were entered on the same date. A copy of the findings of fact and conclusions of law are attached as Exhibit A.

Consistent with the Court's findings of fact and conclusions of law, final judgment is entered in this matter as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Petitioner's LUPA petition is GRANTED.

2. The decision by the Yelm City Council on February 12, 2008, is reversed and this matter is remanded to the Yelm City Council with instruction that each of the five preliminary subdivision approvals issued by the City of Yelm on February 12, 2008, shall be modified as follows:

The condition of preliminary plat approval contained in the Hearing Examiner's Decisions on Reconsideration dated December 7, 2007, and incorporated into the Yelm City Council's decision dated February 12, 2008, shall be modified by striking the word "/or" and inserting the word "also" as follows:

> The applicant must provide a potable water supply adequate to serve the development at final plat approval and/or <u>also</u> prior to the issuance of any building permit except as model homes as set forth in Section 16.04.150 YMC [Yelm Municipal Code].

3. Yelm shall provide written notice to Petitioner pertaining to final subdivision approval of the five proposed subdivisions as follows:

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a. Yelm shall provide written notice to Petitioner of any application for final subdivision approval of any of the five subdivisions within five days of Yelm's receipt of such application.

b. Yelm shall provide Petitioner thirty days written notice and an opportunity to comment upon any proposed findings by Yelm pertaining to the "appropriate provisions . . . for potable water supplies" for each of the five subdivisions prior to any final subdivision approval for those five subdivisions.

c. Yelm shall provide Petitioner thirty days written notice of any City Council hearing to consider final subdivision approval for any of the five subdivisions. Petitioner shall have the opportunity to provide oral and written testimony at any such hearing.

d. This Court retains jurisdiction over this matter. Petitioner may seek judicial review of any such decision by this Court as she deems necessary, following Yelm's action on any of the five subdivision approvals.

4. All parties shall bear their own costs and attorneys' fees.

DONE IN OPEN COURT this 7 day of November, 2008.

JUDGE CHRIS WICKHAM

Presented by:

GORDONDERR LLP

By: _____
Keith E. Moxon, WSBA #15361
Dale N. Johnson, WSBA #26629
Attorneys for JZ Knight

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EXHIBIT H

7

☐ EXPEDITE
☐ No hearing set
➢ Hearing is set
Date: November 7, 2008
Time: 9:00 a.m.
Judge/Calendar: Chris Wickham

FILED
SUPERIOR COURT
THURSTON CO. WA
'08 NOV -7 P2:05

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

J Z KNIGHT,

Petitioner,

v.

CITY OF YELM; WINDSHADOW LLC; ELAINE C. HORSAK; WINDSHADOW II TOWNHOMES, LLC; RICHARD E. SLAUGHTER; REGENT MAHAN, LLC; JACK LONG; PETRA ENGINEERING, LLC; SAMANTHA MEADOWS LLC; TTPH 3-8, LLC,

Respondents.

No. 08-2-00489-6

AMENDED FINDINGS AND CONCLUSIONS

[PROPOSED]

THIS MATTER came before the Court on the petition of Petitioner JZ Knight pursuant to Chapter 36.70C RCW, the Land Use Petition Act ("LUPA"). Petitioner challenged the City of Yelm's decision (Resolution No. 481, adopted February 12, 2008) approving five proposed subdivisions: SUB-05-0755-YL & PRD-05-0756-YL (Windshadow I); SUB-05-07-0128-YL & PRD 07-0129-YL (Windshadow II); BSP-07-0094 (Wyndstone); BSP-07-0097-YL & PRD-07-0098-YL (Berry Valley I); SUB-07-0187-YL (Tahoma Terra Phase II, Division 5 & 6).

The Court considered the following evidence:

1. The record evidence for each of the five proposed subdivisions, including the City of Yelm files for these projects, the Hearing Examiner's Report and

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Decision dated October 9, 2007, the Hearing Examiner's Decision on Reconsideration dated December 7, 2007, and all exhibits and attachments listed in the Hearing Examiner decisions.

2. Petitioner's and Respondents' submissions to the Hearing Examiner;

3. Petitioner's and Respondents' submissions to the Yelm City Council;

4. The Yelm City Council's decision on the five proposed subdivisions;

5. Petitioner's LUPA appeal petition;

6. Petitioner's and Respondents' other submissions to this Court;

7. The Amicus brief provided by the Washington State Department of Ecology and Respondents' responses thereto;

8. Oral argument of the parties; and

9. The pleadings and records on file in this action.

Based on the evidence in the record and the applicable law, the Court makes The following Findings of Fact and Conclusions of Law:[1]

I. FINDINGS OF FACT

1. Petitioner brought this petition under the Land Use Petition Act ("LUPA"), RCW 36.70. Standards for granting relief are set forth in RCW 36.70C.130. Petitioner claims that the decision of Respondent City of Yelm ("Yelm") (Resolution No. 481, adopted February 12, 2008) approving five proposed subdivisions: SUB-05-0755-YL & PRD-05-0756-YL (Windshadow I); SUB-05-07-0128-YL & PRD 07-0129-YL (Windshadow II); BSP-07-0094 (Wyndstone); BSP-07-0097-YL & PRD-07-0098-YL (Berry Valley I); SUB-07-0187-YL (Tahoma Terra Phase II, Division 5 & 6) should be reversed because (1) it is an erroneous interpretation of the law; (2) the City's determination of water availability is not supported by

[1] Any finding of fact that may be deemed a conclusion of law is incorporated into the Conclusions of Law section, and any conclusion of law that may be deemed a finding of fact is incorporated into the Findings of Fact section.

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substantial evidence; and (3) the City's determination of water availability is a clearly erroneous application of the law to the facts.

2. On October 9, 2007, the Yelm Hearing Examiner granted preliminary approval of the five proposed preliminary subdivisions. Following Petitioner's request for reconsideration, on December 7, 2007, the Hearing Examiner entered a decision on reconsideration that contained the following condition:

> The applicant must provide a potable water supply adequate to serve the development at final plat approval and/or prior to the issuance of any building permit except as model homes as set forth in Section 16.04.150 YMC [Yelm Municipal Code] (emphasis added).

3. At the hearing before the Court, Yelm agreed to amend the language of this condition to remove the word "/or" to make clear that proof of adequate potable water must be made at the time of final plat approval and may not be deferred to the time of building permit approval. The other Parties appear to be in agreement with the City's position on this issue.

4. The record contains evidence that Yelm has been issuing building permits and other approvals since 2001 that committed Yelm to the supply of water in excess of its Department of Ecology ("Ecology") approved water rights. Amicus Ecology indicated that at the time of the Hearing Examiner proceedings in this case, Yelm held primary (additive) water rights authorizing use of a total of 719.66 acre feet per year ("afy"). Prior to December 2006, Yelm's water right totaled 564 afy. Yelm's usage records show that the amount of water used by the City since 2001 exceeded its legal water rights.

5. Ecology is the administrator of water resources in the State of Washington, pursuant to Chapter 43.21A RCW, Chapter 90.03 RCW, Chapter 90.14 RCW, Chapter 90.44 RCW, and Chapter 90.54 RCW. The Washington Water Code requires that Ecology determine whether water sought is physically and legally available for use.

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6. The Nisqually River Basin is the subject of rules and restrictions regarding water appropriation because of the importance of stream flow in that basin. Yelm is in that watershed.

7. After the record in this case was closed, Yelm acquired and Ecology approved for municipal supply 77 afy of additional primary water rights. This brings Yelm's total primary water rights to 796.66 afy. According to Ecology, the resulting demand on Yelm's water supply following final approval of the subdivisions at issue in this case will be 910.53 afy, which does not consider other developments approved by Yelm. At present, therefore, the City does not have "a potable water supply adequate to serve the development . . .".

8. Respondent TTPH 3-8 (Tahoma Terra) has obtained water rights for transfer to Yelm to assist Yelm in meeting its obligations to ensure adequate potable water is available to serve its proposed development. Only some of these transfers have been approved by Ecology.

II. CONCLUSIONS OF LAW

1. The issues presented for final resolution in this matter involve the interpretation and application of RCW 58.17.110 and Yelm Municipal Code (YMC) Chapter 16.12.

a. RCW 58.17.110 provides, *inter alia*, that:

> (2) A proposed subdivision . . . shall not be approved unless the city, town, or county legislative body makes written findings that (a) Appropriate provisions are made for . . . potable water supplies . . .; and (b) the public use and interest will be served by the platting of such subdivision and dedication.

b. YMC 16.12.170 further provides that:

> A proposed subdivision and any dedication shall not be approved unless the decision-maker makes written findings that:
>
> A. Appropriate provisions are made for the public health, safety, and general welfare and for . . . potable water supplies.

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D. Public facilities impacted by the proposed subdivision will be adequate and available to serve the subdivision concurrently with the development or a plan to finance needed public facilities in time to assure retention of an adequate level of service.

c. *In relevant part,* YMC 16.12.310 provides:

Upon finding that the final plat has been completed in accordance with the provisions of this title and that all required improvements have been completed or that arrangements or contracts have been entered into to guarantee that such required improvements will be completed, and that the interests of the city are fully protected, the city council shall approve and the mayor shall sign the final plat and accept dedications as may be included thereon.

d. YMC 16.12.330, further provides:

A subdivision shall be governed by the terms of approval of the final plat, and the statutes, ordinances and regulations in effect at the time of approval under RCW 58.17.150(1) and (3) for a period of five years after final plat approval unless the legislative body finds that a change in conditions creates a serious threat to the public health or safety in the subdivision. . . A final plat shall vest the lots within such plat with a right to hook up to sewer and water for a period of five years after the date of recording of the final plat.

2. Petitioner first asserts that Yelm may not delay proof of a potable water supply until issuance of building permits. Second, Petitioner asserts that Yelm must demonstrate the existence of appropriate provision for potable water necessary to serve the proposed developments at the time of final plat approval through evidence of Ecology approved water rights.

3. Preliminary plat approval can be conditioned on the applicant resolving identified issues before final plat approval. 17 Stoebuck and Weaver, Real Estate: Property Law, Washington Practice Series, p.282 (2004). However, RCW 58.17.110 prohibits approval of a proposed subdivision unless written findings are made that"[a]ppropriate provisions are

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made for ... potable water supplies." Therefore, all requirements must be met and confirmed in written findings before final approval pursuant to RCW 58.17.110. The law is clear that these conditions, including the provision of a potable water supply, must be met before the building permit stage. Thus, the hearing examiner's condition, as written and as adopted by the Yelm City Council, is an erroneous interpretation of the law.

4. The parties have agreed that it is appropriate to amend the language of the Hearing Examiner's condition by removing the word "/or" to make clear that proof of adequate potable water must be made at the time of final plat approval and may not be deferred to the time of building permit approval. The insertion of the word "also" is consistent with the Yelm's argument before the Court that proof of potable water must be provided at both final plat approval and building permit approval. Such a resolution is consistent with the law.

5. RCW 58.17.110 and YMC 16.12.170 make clear that Yelm must make findings of "appropriate provisions" for potable water supplies by the time of final plat approval. Based upon the present record and this Court's interpretation of the law, such findings would require a showing of approved and available water rights sufficient to serve all currently approved and to-be approved subdivisions. A finding of "reasonable expectation" of potable water based upon Yelm's historical provision of potable water would be insufficient to satisfy this requirement.

6. Yelm has argued that final plat approvals of the subdivisions in this matter are not expected in the near future. It is therefore possible that at the time of final subdivision approvals the facts and the law that will bear upon Yelm's ability to demonstrate the existence of "appropriate provisions" for potable water to serve these subdivisions may have changed. Accordingly, it is appropriate to defer the determination of "appropriate provision" until the time of final subdivision approval for each of the five subdivisions.

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7. Petitioner holds water rights that are subject to impairment in the event Yelm should continue to use water in excess of its Ecology approved water rights. Accordingly, Petitioner is entitled to written notice pertaining to final subdivision approval of the five proposed subdivisions, including: (1) written notice of any application for final subdivision approval of any of the five subdivisions within five days of Yelm's receipt of such application; (2) ~~thirty~~ days written notice and an opportunity to comment upon any proposed findings by Yelm pertaining to the "appropriate provisions . . . for potable water supplies" for each of the five subdivisions prior to any final subdivision approval for those five subdivisions; and, (3) ~~thirty~~ days written notice of any City Council hearing to consider final subdivision approval for any of the five subdivisions. Petitioner shall have the opportunity to provide oral and written testimony ~~at any such hearing~~ before the Yelm City Council. Finally, Petitioner may seek judicial review ~~by this Court~~ of any decision by Yelm pertaining to final plat approval of any of the five subdivisions ~~as she deems necessary~~.

DATED this 7 day of November, 2008.

JUDGE CHRIS WICKHAM

Presented by:

GORDONDERR LLP

By: _____
Keith E. Moxon, WSBA #15361
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APPENDIX - 5

TITLE 4. CIVIL PROCEDURE
CHAPTER 4.84. COSTS

Rev. Code Wash. (ARCW) § 4.84.370 (2010)

§ 4.84.370. Appeal of land use decisions -- Fees and costs

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

HISTORY: 1995 c 347 § 718.